STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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On Its Own Motion	:	
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Investigation of Rider CPP of	:	
Commonwealth Edison Company,	:	
and Rider MV of Central Illinois	:	**06-0800**
Light Company d/b/a	:	
AmerenCILCO, of Central Illinois	:	
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AmerenCIPS, and of Illinois Power	:	
Company d/b/a AmerenIP,	:	
pursuant to Commission Orders	:	
regarding the Illinois Auction.	:	

PROPOSED ORDER

DATED: July 12, 2007

TABLE OF CONTENTS

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	:	
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Commonwealth Edison Company,	**:**	
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PROPOSED ORDER

I. PROCEDURAL HISTORY

On December 20, 2006, the Illinois Commerce Commission ("Commission") entered an order initiating this proceeding to review the Illinois Auction process as a result of findings it made in orders entered in Docket No. 05-0159 and in Docket Nos. 05-0160, 05-0161, and 05-0162 (Consolidated) on January 24, 2006. In those proceedings (collectively referred to as the "Procurement Dockets"), the Commission approved tariffs, with modifications, that created an auction process (the "Illinois Auction") under which the four largest electric utilities in Illinois purchase the electricity used to serve most of their retail electric service customers on and after January 2, 2007.

In the instant proceeding, Petitions for leave to Intervene were filed by the People of the State of Illinois by the Attorney General, Lisa Madigan ("AG"), Dynegy Inc. ("Dynegy"), the Citizens Utility Board ("CUB"), Constellation NewEnergy, Inc. ("NewEnergy"), Caterpillar, Inc., Olin Corporation, ASF-Keystone ConocoPhillips Company, Tate and Lyle Ingredients America Inc., BOC Gases, Keystone Consolidated Industries, Inc, Cargill, Inc., and Enbridge Energy, jointly as the Illinois Industrial Energy Consumers ("IIEC"), the Retail Energy Supply Association ("RESA"), Commerce Energy, Inc. ("CEI"), Midwest Generation EME, LLC ("Midwest Gen"), Edison Mission Marketing & Trading, Inc. ("EMMT") the Coalition of Energy Suppliers ("CES"), and Peoples Energy Services Corporation ("PES"). These Petitions for leave to intervene were granted. The City of Chicago filed a notice of appearance.

J. Aron & Company, Morgan Stanley Capital Group Inc. and Constellation Energy Commodities Group intervened, but subsequently withdrew from the case.

Pursuant to notice duly given in accordance with the law and the rules and regulations of the Commission, a pre-hearing conference was held in this matter before the duly authorized Administrative Law Judges (the “ALJs”) of the Commission, at its offices in Springfield, Illinois, on January 23, 2007. At least ten days prior, notice of the prehearing conference was provided by the Chief Clerk of the Commission to municipalities in the service areas of Commonwealth Edison Company (“ComEd”), Central Illinois Light Company d/b/a AmerenCILCO (“CILCO”), Central Illinois Public Service Company d/b/a AmerenCIPS (“CIPS”), and Illinois Power Company d/b/a AmerenIP (“IP”) in accordance with the requirements of Section 10-108 of the Public Utilities Act (“Act”), 220 ILCS 5/10-108.

The following witnesses submitted testimony: Dr. Thomas E. Kennedy, Richard J. Zuraski and Rochelle Phipps on behalf of Staff; Robert R. Stephens on behalf of IIEC; William P. McNeil, Robert K. McDonald, Susan Tierney, Steven T. Naumann, and Eber-Brandt Panel Testimony on behalf of ComEd; Craig D. Nelson, James C. Blessing, Leonard M. Jones, and Timothy I. Moloney on behalf of Ameren; Christopher C. Thomas and Geoffrey C. Crandall on behalf of CUB; Barry Huddleston on behalf of Dynegy; Dr. Kenneth Rose on behalf of the AG; John L. Domagalski, Katie Papadimitriu, and Vu Nguyen on behalf of CES; Thomas Ulry on behalf of Direct Energy Services, LLC ("DES") and CEI; and Frank C. Graves for EMMT/MW Gen; also filing testimony was Dr. Chantale LaCasse, Auction Manager.

Post-hearing initial and reply briefs were filed by ComEd, the Ameren Companies, Staff, CUB, IIEC, the AG, CES, Dynegy, Retail Energy Supply Association, DES-CEI, and EMMT/Midwest Gen.

A proposed order was served on all parties.

II. BACKGROUND; PURPOSE OF INSTANT PROCEEDING

In its Orders in the Procurement Dockets, the Commission approved use by ComEd and Ameren of a vertical tranche descending clock auction process to obtain electric supply to meet load requirements after January 1, 2007. Bidders compete for one or more tranches of product. Each tranche represents a fixed percentage of load, targeted to achieve a tranche size of 50 MW. The term descending clock derives from the fact that, as long as bidders offer to sell more electricity than the amount sought, the price ticks down after each round of bidding.

The auction was conducted over four days in September, 2006 by an independent auction manager, subject to Commission Staff oversight. The auction consisted of two sections. One was for fixed price contracts, and consisted of several segments. The other was for hourly price contracts. For the various fixed price segments, there were 14 winning bidders for one of more tranches of the ComEd products and nine for Ameren.

The Commission approved the results of the fixed price section, but not the hourly price section.

Thereafter, winning bidders signed load-following supplier forward contracts for the various fixed price products. For smaller commercial customer groups including residential customers, the initial auction held in September 2006 included a blend of 17-month, 29-month, and 41-month forward contracts; each covers one-third of the eligible load. For larger fixed price customers, one-year supply contracts were used. On and after January 2, 2007, electric supply has been obtained by ComEd and Ameren pursuant to these contracts.

Pursuant to the terms of the Orders in the Procurement Dockets, the Commission entered an order initiating the instant docket, 06-0800. With respect to the purpose and scope of this proceeding, the Commission found that a docketed review should be initiated to determine whether the Commission should order any changes in the auction process. The Commission emphasized that it was not inviting wholesale relitigation of issues the Commission disposed of in the Procurement Dockets.

Rather, the intent was that issues be directly related to matters that have come to the attention of the parties as a result of the conduct of the auction process itself, or that relate to proposed changes to the auction process to address facts or circumstances that are new or far different from those considered in the Procurement Dockets.

III. AUCTION DESIGN, MECHANICS AND IMPLEMENTATION

This section of the order addresses issues relating to Auction design, mechanics and implementation.

As noted above, the Procurement Orders approved use by ComEd and Ameren of a vertical tranche descending clock auction process to obtain electric supply to meet load requirements after January 1, 2007. Bidders compete for one or more tranches of product. As long as bidders bid on more electricity than the amount sought, the price ticks down after each round of bidding.

The Commission also observes that a series of credit-related issues, although largely pertaining to Auction design, have been placed in a separate section below due to the length of that discussion.

A. AG's Reserve Price Proposal

1. AG's Position

The AG opposes the use of a uniform-price reverse auction to procure electricity and to set retail rates for the customers of ComEd and Ameren. The AG argues that as a procurement method, the 2006 auction failed because it produced prices that were at least 40% percent higher than the wholesale electricity prices and were significantly higher than the actual cost of generating electricity. The AG further asserts that the auction also fails as a rate-setting mechanism, because the Act does not authorize the use of market-based rates, set automatically by the auction, for electric service that has not been declared competitive pursuant to Section 16-113 of the Act. (AG Initial Brief at 3)

The AG recommends the use of benchmarks to evaluate procurement costs. The AG states that wholesale market prices and generation costs are appropriate benchmarks that can be used to set a reserve price at the start of a procurement process and to assess clearing prices at the end of a procurement process. The AG suggests that these benchmarks could be used in combination with others, should the Commission choose to adopt additional benchmarks. (AG Initial Brief at 3-4)

The AG asserts that the wholesale market price is an appropriate benchmark to use to evaluate procurement costs. The AG claims this benchmark is appropriate because there is a clear relationship between the prices that wholesale suppliers offer to retail customers and prices in the various wholesale markets in which the suppliers operate. According to the AG, if prices in the wholesale market are lower than prices produced in a procurement process for comparable products, it would make sense to reject the results of the procurement process and, instead, to purchase electricity directly from the wholesale market. (AG Initial Brief at 4)

The AG says the ComEd zone prices are consistently lower than overall PJM prices. According to the AG, for the ComEd zone of PJM, the load-weighted average annual real-time price in 2006 was $45 per megawatt-hour (“MWh”), while the overall PJM load-weighted average annual real-time price was $53.4/MWh in 2006. (AG Initial Brief at 4)

The AG contends that generation cost is also an appropriate benchmark to use to evaluate procurement costs. The AG claims that in a truly competitive market, there is a relationship between the price charged for a product and the cost of producing that product. The AG asserts that competition among producers drives the price down toward production cost and the producer with the lowest production cost makes the sale. The AG says this price competition benefits consumers. (AG Initial Brief at 5)

The AG’s analysis of generation cost data, relied on a Commission-sponsored study conducted jointly by Argonne National Laboratory and the University of Illinois at Urbana Champaign that calculated the location marginal prices (“LMPs”) for sub-areas or zones in the Illinois power system. The AG states that ninety percent of the time, LMPs throughout Illinois were below $30/MWh and 95% of the time they were below $40/MWh. The AG says LMPs exceeded $65/MWh only about 1% of the time. (AG Initial Brief at 5)

The AG asserts that the 2006 auction clearing prices failed to meet these benchmarks. The AG states that the average price produced by the 2006 fixed-price auction for small and medium customers was approximately $65/MWh – more than 40%

higher than the 2006 load-weighted average annual price of $45/MWh in the ComEd zone. The AG says only 26 days in 2006 had a weighted average price that exceeded the lowest auction price. According to the AG, 93% of the weighted average daily prices were below the auction price range. (AG Initial Brief at 5-6)

The AG argues that the large difference between the auction clearing prices and wholesale market prices cannot be explained away as a “risk premium.” The AG says a risk premium reflects load changes (increases or decreases), market uncertainty and regulatory risks. In the AG’s view, the large difference between auction clearing prices and production costs suggest that rather than a risk premium, suppliers may have marked up the wholesale price and auction price above a competitive level. (AG Initial Brief at 6)

According to the AG, to the extent that the Commission is involved in future electricity procurement processes, it should use wholesale market prices and generation costs as benchmarks to assess the prices produced by the procurement process. The AG says benchmarks could be applied at the end of the process or used as a “reserve price” that is set prospectively. The AG suggests that the Commission may also wish to consider additional benchmarks. (AG Initial Brief at 6)

The AG indicates that various parties objected to its proposed use of a “reserve price” to ensure that a procurement process produces the lowest possible price for electricity. The AG states that the primary criticisms were that: (1) the AG’s “reserve price” proposal was not sufficiently specific; and 2) that there is no analogue in the market that could be used to set a reserve price for the type of “premium” full-requirements product sold in the 2006 auction. (AG Reply Brief at 1-2)

According to the AG, both of these objections should be rejected. The AG states that in 2006 the Auction Manager set an opening price based on language in a Commission order that was no more specific than the reserve price proposal made by the AG in the instant case. The AG argues that in order to recover the cost of procuring electricity a utility must demonstrate that the cost was prudently incurred, whether the cost is incurred to purchase a standard product or a custom product of the type procured through the 2006 auction. (AG Reply Brief at 2)

The AG says the Commission is required to assess prudency whether or not there is a handy market analogue to use in that assessment. The AG asserts that if there is not a market analogue, the Commission necessarily applies other criteria or benchmarks. According to the AG, such benchmarks can be used at the end of the process to reject bids and/or to deny cost recovery. In the AG’s view, setting a reserve price at the start of the process is more efficient and helps to avoid unnecessary uncertainty for the utilities and electricity suppliers. (AG Reply Brief at 2)

2. ComEd's Position

The Commission, ComEd argues, should not adopt a reserve price to evaluate whether the wholesale electricity supplies procured through the auction are just and reasonable. ComEd believes the AG's suggestion would not improve the auction process, and it could have significant negative impacts. ComEd claims the suggestion is ill-conceived and inherently misaligned with the auction. ComEd claims that by suggesting that the Commission might consider a reserve price based on the wholesale market price, the AG is essentially calling for a different process from the competitive auction process used by the Commission. (ComEd Initial Brief at 20)

ComEd contends a reserve price, as typically used in an auction environment, does not apply to the Illinois Auction. ComEd asserts that in that environment, sellers might decide on a reserve floor price (or minimum offer) below which they are unwilling to sell; if bidders do not meet that price, the sellers will not sell. ComEd claims that in a reverse auction, buyers might set a reserve maximum price at which they are willing to buy the product, if the auction price fails to go down to that level the buyer walks away from the deal. ComEd states that in this environment, buyers and sellers can decide to engage in transactions based on hard-and-fast cut-off prices. (ComEd Initial Brief at 20; Reply Brief at 14)

These principles, ComEd argues, do not readily transfer to the Illinois Auction. ComEd states that in this Auction, buyers (Illinois electric utilities) procure all-requirements, load-following electric resources at market prices to meet the needs of its customers at fixed prices for a certain term length and other terms and conditions in the contract. ComEd asserts that because each utility must procure its power from the market, and all parties know that, the utilities do not have an option to walk away from buying power. (ComEd Initial Brief at 20; Reply Brief at 14-15)

ComEd argues that if the reserve price was set at a level that is lower than the results of the actual auction, deemed fully competitive, that reserve price would not reflect market conditions, and thus would be neither helpful nor valid for the purposes of procurement or ratemaking. ComEd claims that this situation would leave utilities high and dry and customers without access to electricity at a competitive price. According to ComEd, the alternative, the spot market, has its prices, but is a market very different from the one to which the Commission found that utilities should be turning initially. (ComEd Initial Brief at 21)

Using a reserve price, ComEd alleges, is a fundamentally flawed way to determine whether the auction is reasonable; rather, the best way to make that determination is viewing the results of the competitive auction itself after the fact. ComEd claims that manufactured benchmarks established before the fact will not assist either utilities or the Commission in this endeavor. (ComEd Initial Brief at 21)

ComEd says that AG witness Dr. Rose cited no literature or evidence suggesting that the use of a reserve price would improve the auction process. ComEd states that it is true that under very specific conditions, the best way to sell an item is to use a standard auction with a pre-announced reserve price that is relied upon to make the final decision to accept or reject the winning bid.

Under this approach, ComEd says the Commission would need to announce a reserve price ahead of the auction and would relinquish any other ability to review the bids. ComEd adds that as long as the announced reserve price was met, the Commission would not have the ability to reject the bids. ComEd also argues that the very specific conditions would likely not be met for procuring full-requirements tranches (e.g., many bidders in the proposed auction will make an assessment of the same future market opportunities and risks in putting together their bids, and, as one bidder's evaluation is useful information to another bidder when assessing a common market opportunity, the last condition – that the "independent private values" model describes the uncertainty faced by bidders – would fail). (ComEd Initial Brief at 21-22; Reply Brief at 15, 17-18)

Use of reserve prices, ComEd contends, would be tantamount to abandoning the auction-based procurement process that the Commission has adopted and used successfully. ComEd claims that although packaged as an improvement to the auction process, this suggestion would be a material change to the auction framework, which would be neither justified nor within the scope of this docket. According to ComEd, this proposition would in essence move away from the basic notion of competitive procurement of full-requirements supply at revealed wholesale market prices. ComEd asserts that even if the auction produces a competitive result, the AG is proposing that there is still, somehow, a better proxy for competitive prices. ComEd believes this is inconsistent with the Commission's approval of the Illinois Auction and an ill-advised regulatory policy. (ComEd Initial Brief at 22; Reply Brief at 18)

The specific benchmarks that the AG has suggested, ComEd avers, are inappropriate, as they do not reflect the actual wholesale electricity product being procured in the Illinois Auction. ComEd states that the benchmark based on wholesale market prices incorporates historical market prices as opposed to a forward-looking view of market prices, fails to account for the nature of the uncertainty associated with the suppliers' load following obligation, does not adequately consider the cost of capacity, and ignores migration risk, counterparty credit risk, and risks associated with changes in laws and regulations.

ComEd says the other benchmark that the AG presents suffers from many of the same flaws that the benchmark based on wholesale market prices suffers from, and additionally is based on a study that was designed to be exploratory and not predictive, uses data which is now obsolete, ignores most of the relevant PJM market, ignores how the PJM and MISO markets are structured and dispatched, does not correctly consider operational considerations, uses incorrect fuel data, and ignores certain other real costs to generators. A marginal cost benchmark is theoretically inappropriate, according to ComEd. (ComEd Initial Brief at 22-23; Reply Brief at 15-17)

In its Reply Brief, ComEd says nothing supports the AG's claim that if wholesale market prices are lower than those generated by the Auction for comparable products, the Auction results should be rejected and electricity should be purchased in the wholesale market instead. ComEd complains that the AG fails to specify which wholesale market prices it is proposing for use, or how such prices, even if identified, could be translated into the reserve price. ComEd suggests there is an inherent difficulty in even constructing a benchmark because there is no visible product that is traded in the wholesale market upon which a direct comparison can be made. ComEd further asserts that there are not comparable products. (ComEd Reply Brief at 16)

According to ComEd, the Auction products include serious risks, which the standard market prices simply do not reflect. ComEd asserts that while the AG argues that risk premiums cannot explain the entire differential, it simply fails to account for the many risks contributing to the differential. ComEd contends that the AG's claim that the difference may also be a result of suppliers' marking up wholesale and auction prices above a competitive level is not only unexplained, but also directly undermined by its own witness Rose's admissions on cross-examination. ComEd alleges that Dr. Rose conceded that he had no evidence of anti-competitive behavior in the 2006 Auction, there were no violations of the Commission's rules or protocols, and the results of the Auction were consistent with market conditions. (ComEd Reply Brief at 16-17, citing Tr. at 392-93, 417)

ComEd says the Commission initiated this proceeding to conduct a docketed review of the auction process as contemplated by the orders in the procurement dockets. The Commission, ComEd adds, emphasized that it was not inviting wholesale relitigation of issues the Commission disposed of in the Procurement Dockets. In the procurement dockets, ComEd says the Commission considered and rejected alternatives to the auction, determining, for example, that the auction proposal is a better procurement method than an active portfolio and that nothing that has been presented in this proceeding or in any other forum provides any basis for reaching a different outcome or for proposing any other procurement approach. ComEd states that under the terms of the Commission's Initiating Order, consideration of alternatives to the auction process is not within the scope of this proceeding. (ComEd Initial Brief at 23-24)

3. Ameren's Position

According to Ameren, the AG recommended implementing benchmark comparisons of the wholesale market prices and production costs of electricity. Ameren says the AG asserts that such benchmarking is necessary because the auction clearing price is higher than (1) the wholesale market price he selected and (2) some (but not all) of the costs of producing, marketing and delivering electricity to the point of sale. The AG states that the cost of capacity, transmission, and ancillary services be considered, however, such cost components would only account for a portion of the difference in the auction-clearing price and wholesale price upon which he focuses. (Ameren Initial Brief at 61)

In Ameren's view, the AG's market comparisons do not help to enhance the auction process. Ameren says the auction price certainly includes the "wholesale market price" but necessarily also includes costs or premiums associated with switching risk, load following, MISO charges, the risk of laws or rules changing, the risk of change in fuel prices, utility credit risk, administrative costs, transactional costs and other charges suppliers have to incur to market and deliver the product. Ameren asserts that these charges would still be reflected in the end price paid to suppliers even in bilateral transactions. Ameren adds that if products are restructured to remove these risks from suppliers, it does not mean that these risks no longer exist. Ameren asserts that they are simply transferred to Ameren and then ultimately to end-use customers. (Ameren Initial Brief at 61-62)

Ameren suggests that the AG's proposal to rely upon the generation or production cost as an appropriate benchmark is equally unrealistic. Ameren argues that while the AG may wish that wholesale suppliers would willingly sell at production cost and ignore their other costs and the many volumetric and operational risks associated with supplying full requirements, this is not the reality of the marketplace from which Ameren must procure supply to fulfill its obligations. Ameren says no wholesale entity is obligated to offer to sell any product at any particular price to Ameren at all, let alone an obligation to offer to sell at the AG's expectation of what the price should be. (Ameren Initial Brief at 62)

Whether supply is obtained from BGS Suppliers, through bilateral contracts, or from the MISO-administered LMP markets, Ameren contends that someone bears these risks. Ameren asserts that risks which are not transferred to suppliers will be borne by Ameren and its customers. According to Ameren, transferring certain risks from suppliers, such as that which is done with a shortened enrollment window, can be expected to result in a price benefit which exceeds any incremental risk borne by customers; however, this is not true of all risks. While the price of the auction product may indeed be lowered by transferring from suppliers all of these risks, Ameren claims this does not necessarily suggest that the overall total cost to consumers is reduced. (Ameren Initial Brief at 62)

Ameren says the AG also recommends using its benchmark proposal to set a "reserve price" for the auction. Presumably, Ameren suggests, if the auction price results are higher than his reserve price, the auction evidently fails and supply must be procured in the wholesale market. Ameren believes that setting a "reserve price" that does not include all supplier costs or consider all supplier risks would be unrealistic. Ameren argues that failing to factor volumetric and operational risks, and all other costs, into this reserve price will necessarily guarantee that the reserve price is invalid and unachievable. According to Ameren, setting an unachievable price as the benchmark will doom the auction to failure and result in the entire supply requirement being acquired via contingency purchase plans, thus exposing customers to other major risks. (Ameren Initial Brief at 63)

Ameren believes that setting a “reserve price” only makes sense if one knows that one or more suppliers will serve the load at that price. Ameren argues that in reality, there is no way to determine at what price suppliers will serve a particular load without going to the market and soliciting bids – which is exactly what a transparent, competitively-bid, auction procurement process is designed to accomplish. Ameren asserts that the AG’s benchmarking and reserve price proposal is not helpful and recommends that it be rejected. (Ameren Initial Brief at 63)

4. EMMT/Midwest Gen’s Position

Midwest Gen believes that the review of auction results is not a simple process and requires more than a single criterion. Midwest Gen claims the primary metric by which to evaluate success of the auction is its compliance with pre-established auction rules and whether the auction involved active, persistent and aggressive bidding unaffected by process problems or external events. Midwest Gen believes that evidence in the affirmative should lead to acceptance of the auction outcome. (EMMT/Midwest Gen Initial Brief at 14)

According to Midwest Gen, price comparisons, if used, should look to a variety of metrics, including a range of risk-adjusted, retail-adjusted forward price estimates, past auction prices, auction prices elsewhere for similar products, and relative prices within the auction. Price benchmarks, Midwest Gen asserts, would be particularly inappropriate if they were backward-looking, such as price comparisons to previous years’ energy prices or production costs. Midwest Gen claims that the Illinois supply auction is a forward-looking process, with auction prices driven by expectations of future energy prices, rather than past energy costs. To that extent, Midwest Gen suggests future price expectations incorporate factors unconnected to preceding years, including forward prices for power and fuels and the perceived uncertainty in future market conditions and regulatory rules over the service-contract horizon. (EMMT/Midwest Gen Initial Brief at 14-15)

Midwest Gen asserts that relying on energy prices alone as a benchmark is deceptive as this approach excludes predicted prices for capacity, transmission, and ancillary services that have to be provided as part of the supply obligation. Midwest Gen also claims that one must consider fuel-cost risk as well as volumetric risk with respect to the amount of energy that must be provided. According to Midwest Gen, these non-energy factors are inextricable elements of auction prices and must be considered in any post-auction price-based comparisons. (EMMT/Midwest Gen Initial Brief at 15)

5. Dynegy’s Position

Dynegy indicates that the AG proposed the use of a reserve price as a part of determining whether to accept the Auction results. Dynegy’s primary concern at this stage is that the reserve price proposal is too undeveloped to be debated, much less adopted. Given this lack of specificity, Dynegy believes the use of a reserve price should be rejected at this time. (Dynegy Initial Brief at 6-7)

According to Dynegy, neither the wholesale market price nor the generation cost described by the AG's witness bear sufficient resemblance to the auction product to be capable of use as a benchmark. Dynegy states that while it is true that the AG's proposed benchmarks are at least electricity-based products, this is not a matter of apples and oranges; it is more akin to apples and anchovies. (Dynegy Reply Brief at 2)

6. Staff's Position

According to Staff, the nature of a reverse clock auction such as the Illinois Auction is to begin with prices high enough to attract significantly more supply than is actually needed (the tranche targets). In subsequent rounds, the prices are methodically reduced, and bidders revise their bids, until there is just enough supply to fill all the tranche targets. Staff states that no witness proposed an alternative starting price that fits within that basic mold of the Illinois Auction. (Staff Initial Brief at 13)

Staff indicates that the AG proposed that benchmarks could be used to set a starting price or a reserve price in the auction. Staff says that the AG proposed for the Commission to consider a reserve price based on the wholesale market price. The AG says this would indicate that, if the auction is unable to secure sufficient supply at that price, the distribution company or some other entity could purchase power on the wholesale market, at least for short-term purchases. (Staff Initial Brief at 13-14)

Staff says the AG suggests adopting a reserve price based on the wholesale market price, but it does not specify which wholesale market price would form the basis for its proposed reserve price, or how that particular wholesale market price would be translated into the reserve price. In Staff's view, the AG's reserve price is largely theoretical rather than practical because it is not specified well enough to be implemented at the end of this proceeding. (Staff Initial Brief at 19)

Staff asserts that to the extent that the AG does provide some hints about its electricity cost benchmark and reserve price, they would seemingly ignore many of the costs and risks borne by the winning bidders that are inherent in the supplier forward contracts approved by the Commission. Staff says the products of the Illinois Auction are premium products that can be expected to exact premium prices. Not only are they load-following full requirements long-term forward contracts (which can be expected to carry a premium above fixed block long-term forward contracts), Staff states that they are load-following full requirements contracts in retail open-access service territories (which, due to the risk of customers switching between utility supply and alternative supply, would add additional premium to the price). Staff adds that in the September 2006 auction, the supply contracts also included one-sided mark-to-market protection for ratepayers, which presumably added a further premium to the price. (Staff Initial Brief at 20)

When the AG states that if the auction is unable to secure sufficient supply at that price, the distribution company or some other entity could purchase power on the wholesale market, at least for short term purchases, Staff argues that this is simply another way of saying that when the auction price for these premium products inevitably turns out to be above the price of lower-grade products, the utility will have to purchase these alternatives through some kind of alternative procurement method. Staff states that since the AG's benchmark seems destined to reject the premium products of the Illinois Auction, it is prudent to know what the inevitable alternatives are going to entail. (Staff Initial Brief at 20-21)

Staff believes that constructing an appropriate benchmark for rejecting auction results would be inherently difficult. Staff asserts that the products that are procured through the Auction – i.e., fixed-price full requirements service for Illinois utilities' customers – do not have an analogue in the wholesale markets. Staff asserts that because there is no visible product that is traded in the wholesale market upon which a direct comparison can be made, any wholesale market price benchmark is therefore imperfect. (Staff Initial Brief at 21)

According to Staff, even if a more appropriate benchmark could be devised (and used to construct a reserve price), the AG presents no credible evidence that, in this instance, using a reserve price would lead to an improvement (e.g., a reduction in auction prices). Staff suggests that there are conditions and circumstances under which reserve prices can be expected to lead to such an improvement. (Staff Initial Brief at 22; Reply Brief at 20)

In its Reply Brief, Staff says the AG only argues that the September 2006 auction prices were higher than a pair of benchmarks relied upon by the AG. Staff says the AG's benchmarks were roundly criticized by numerous other witnesses in this proceeding and these criticisms were summarized in Staff's Initial Brief at pages 19-23. (Staff Reply Brief at 11)

Staff states that in its Initial Brief, the AG proposes that such benchmarks could be applied at the end of the process or used as a reserve price that is set prospectively, and that the Commission may also wish to consider additional benchmarks. Staff asserts that the AG provides no arguments in support of these proposals in its Initial Brief. To the extent to which the AG tacitly relies upon its discussion of Dr. Rose's proposed wholesale market price and generation cost benchmarks, Staff says there are numerous reasons why these benchmarks should not be adopted by the Commission. (Staff Reply Brief at 18-19)

Staff argues that the AG's benchmarks ignore many of the costs and risks borne by the winning bidders that are inherent in the supplier forward contracts approved by the Commission. Staff avers that the Illinois Auction products are expected to exact premium prices. Staff says the costs or premiums that would be included in the Illinois Auction product prices but are excluded in Dr. Rose's benchmarks include: switching risk, load following, MISO charges, the risk of laws or rules changing, the risk of change in fuel prices, utility credit risk, administrative costs, transactional costs and other charges suppliers have to incur to market and deliver the product. (Staff Reply Brief at 19-20)

7. Commission Analysis and Conclusions

As indicated above, the AG recommends the use of benchmarks, based on wholesale prices and generation cost, in the procurement process. According to the AG, the benchmarks could either be applied at the end of the process to determine whether market clearing prices are reasonable, or used as a “reserve price” or starting price that is set prospectively at the start of the procurement process.

ComEd, Ameren, Staff, EMMT/Midwest Gen and Dynegy oppose the AG’s recommendations for the reasons summarized above.

Having reviewed the record, the Commission finds that use of the AG’s proposal should not be required for purposes of setting a starting price. As Staff observes, from a practical standpoint, it is not clear how the proposal is intended to work. The proposal is not specific as to which wholesale prices would form the basis for the reserve price, or how that particular price would be translated into the reserve price. As Staff, ComEd, Ameren, EMMT/Midwest Gen and Dynegy assert, a price that failed to reflect the costs and risks borne by winning bidders for full requirements load-following contracts would not be a meaningful reserve price.

Further, it is not clear how the bidding process contemplated under the AG’s proposal is intended to work, in terms of what happens next, in the event no supplier submits a bid at the starting price, or conversely, in the event suppliers do submit bids at the starting price. In addition, as ComEd explains, announcing a predetermined reserve price as a starting price would appear to deprive the Commission of any opportunity to reject bids.

With respect to whether the Commission has the flexibility to consider benchmarks when evaluating clearing prices during the post-auction review period, the Commission is not precluded from doing so pursuant the original Procurement Orders or the instant order. However, the Commission believes it would be inappropriate to evaluate the reasonableness of market clearing prices by use of only benchmark-based prices that do not reflect the costs and risks borne by winning bidders for full requirements load-following contracts. In any event, the Commission believes the focus for evaluating market clearing prices in the post-auction review, as was set forth in the Procurement Orders, remains appropriate.

B. CUB's Proposed Modifications to the Fixed Price Section

1. CUB's Position

CUB proposes to modify the Fixed Price Section of the auction to allow the use of demand side bidding. CUB argues that because the current auction only allows generation resources to participate, and excludes other demand side resources such as energy efficiency and demand response, it cannot produce the lowest possible prices. CUB proposes to redesign the auction to create separate, consecutively bid auction products for energy efficiency, demand response, and generation. CUB refers to this as the three-tier bidding approach. (CUB Initial Brief at 3)

CUB says its proposed three-tier bidding approach splits the auction into three consecutive sections. CUB proposes that first the utilities would hold an auction to purchase a block of energy efficiency. The utilities would purchase all energy efficiency resources they perceive to be cost effective. Utilities would then determine the shape and amount of the remaining load that they did not procure in the energy efficiency tier. Second, the utilities would hold an auction to purchase all of the dispatchable, peak-reducing demand response resources that they perceive to be cost effective. CUB proposes that then, the utilities would again determine their remaining needs. CUB says the resulting load curve would become the basis for the third tier auction for generation supply. (CUB Initial Brief at 3-4)

According to CUB, to ensure the success of the three-tier approach, the Commission should make certain that the utilities clearly define the conditions under which they will call demand response resources for economic or reliability reasons. In addition, CUB says that to reduce supply risk, the auction must allow sufficient time for the utilities to compile accurate forecasts of their needs after the first and second tiers.

CUB states that the three-tier approach explicitly incorporates energy efficiency and demand response resources into the auction. CUB believes that Illinois needs such an approach because energy efficiency and demand response resources offer a number of benefits for customers. In CUB's view, existing energy efficiency and demand response programs are not fully capturing those benefits, and the current auction creates barriers to their full participation in the Illinois electricity markets. (CUB Initial Brief at 4)

CUB claims that energy efficiency resources meet customers' energy needs at a lower cost than generation procured under the current Illinois auction. CUB states that the American Council for an Energy Efficient Economy's April 2004 analysis shows that energy efficiency programs in 18 states have reported a cost of between $0.023 and $0.044 per kilowatt-hour ("kWh") saved. CUB asserts that this is significantly lower than the auction-clearing price of approximately $0.064 per kWh. CUB further claims that the amount of energy efficiency that utilities could procure is potentially significant. CUB says a recent study indicates that conservative energy efficiency programs could reduce Michigan's peak electric demand by 660 megawatts ("MW") and annual energy use by

4,952 gigawatt-hours. CUB argues that based on the experience of surrounding states, it is reasonable to believe that significant amounts of energy efficiency are untapped in Illinois, as well. (CUB Initial Brief at 4-5)

According to CUB, demand response also provides significant benefits to consumers, as it disciplines wholesale market prices, reduces opportunities for generators to exercise market power, and ensures an efficient allocation of resources. CUB states that a U.S. Department of Energy report lists three types of benefits to demand response programs: (1) direct participant benefits; (2) collateral benefits, which accrue to all electricity consumers, and (3) other benefits, which are more difficult to quantify.

CUB claims that participant benefits consist of increased reliability and financial benefits, including cost savings from using less energy and shifting usage to lower-priced hours and payments for curtailing usage in a demand response program. CUB asserts that collateral benefits, which accrue to all customers, regardless of participation, result from a more efficient use of the electricity system and include bill savings to consumers from avoided energy and, in some cases, capacity costs. CUB further contends that collateral benefits include additional reliability benefits and long-term market impacts such as avoided capacity investments. CUB states that other benefits identified by the DOE Report include more robust retail markets, improved choice, market performance benefits, and possible environmental benefits. (CUB Initial Brief at 5)

CUB asserts that demand response repairs a market flaw that leads to inefficient prices. CUB says the DOE Report states that states should consider aggressive implementation of price-based demand response for retail customers because flat, average-cost retail rates that do not reflect the actual costs to supply power lead to inefficient capital investment in new generation, transmission and distribution infrastructure and higher electric bills for customers. According to CUB, aggressive demand response and energy efficiency can both protect customers, and can begin to provide discipline lacking in the wholesale markets. (CUB Initial Brief at 5-6)

CUB contends that existing energy efficiency and demand response programs are insufficient to capture the full benefits of these resources. Existing energy efficiency programs are often seasonal and rely on irregular funding by utilities, according to CUB. While CUB supports these programs, CUB believes they do not represent a comprehensive set of energy efficiency resources. CUB states that Illinois does not enjoy the wide range of energy efficiency programs, including rebates, special rate options, and other incentives that are offered in other Midwestern states. CUB argues that Illinois should not rely solely on market price signals to provide incentives for energy efficiency. Market barriers such as high up-front costs for energy efficient equipment and a lack of consumer knowledge, CUB maintains, prevent the market from fully serving the interests of Illinois customers. (CUB Initial Brief at 6)

CUB states that ComEd and Ameren currently offer some demand response programs to customers and ComEd also offers demand response resources into the PJM market. CUB asserts that significant opportunities for demand response expansion remain. CUB says ComEd has only used its Rider CLR7 and VLR7 demand response programs for commercial and industrial customers two times in the past 12 months. According to CUB, these programs could be altered or supplemented to provide more aggressive demand response at times of high peak prices, thereby lowering average prices for all customers. (CUB Initial Brief at 7)

CUB proposes to modify the current auction process because it creates barriers to the use of cost-effective energy efficiency and demand response resources. CUB says the current auction process makes no provisions for demand response and energy efficiency options whatsoever. CUB asserts that the load-following vertical tranche prevents both energy efficiency and demand response resources from competing with supply in the auction. (CUB Initial Brief at 7)

Each vertical tranche, CUB states, is a slice of load measuring 50 MW at peak and perhaps 30 MW on average. CUB says that to supply a tranche, bidders must supply a mix of base load, intermediate, and peaking resources. CUB claims bidders cannot use energy efficiency to supply part of a tranche under existing procedures. This, CUB argues, is because the current auction does not allocate energy efficiency to a specific bidder. According to CUB, energy efficiency provided by one supplier reduces total load, the megawatts that all bidders must supply to fulfill their tranches, and the energy efficiency supplier cannot bid their efficiency into the auction. (CUB Initial Brief at 7)

CUB states that demand response resources only reduce peak demand. CUB argues that the load-following nature of the auction product prevents bidders who specialize in demand response resources from bidding in the auction. CUB says that in practice, it is difficult for demand side resource bidders to assemble resources to serve base, intermediate, and peak load to supply a full tranche. According to CUB, it is very difficult to develop a demand side infrastructure for only a 5-10 MW slice. CUB contends that the three-tier auction process is needed to allow demand side resources to fully participate in the Illinois electricity market. (CUB Initial Brief at 8)

CUB states that PJM and MISO, the underlying wholesale electricity markets in Illinois, balance the amount of electricity demanded with the amount supplied. CUB asserts that the PJM and MISO markets cannot, by themselves, remove these barriers to demand side resources. CUB says neither PJM nor MISO require load-serving entities, such as utilities, to bid either energy efficiency or demand response into the PJM and MISO wholesale markets. CUB adds that the PJM and MISO markets are designed to meet the collective needs of an entire region, not just Illinois. According to CUB, while demand response and energy efficiency benefit customers, we cannot expect that the wholesale markets will send signals of sufficient strength to make it happen. (CUB Initial Brief at 8)

The three-tier bidding process, CUB says, explicitly integrates demand response and energy efficiency into the auction. CUB claims that in doing so, it will result in lower prices for consumers and opportunities for companies that specialize in demand response and energy efficiency. CUB urges the Commission to adopt it. If, however, the Commission does not feel that it can adopt this proposal in time to adjust the 2008 auction, CUB suggests that the Commission open a new proceeding to consider the proposal for a later auction. (CUB Initial Brief at 9)

CUB claims that the Commission has authority to adopt this proposal. According to CUB, the Commission's authority to adopt its proposals comes from both its general authority to ensure just and reasonable rates and from the same source as its ability to adopt any modifications to the current auction. CUB disputes Staff's suggestion that the Commission's recent termination of several rulemaking dockets regarding energy efficiency and demand response issues undercuts the Commission's authority. In CUB's view, the termination of these dockets does not, in itself, speak to the Commission's authority regarding energy efficiency and demand response issues. (CUB Initial Brief at 9; Reply Brief at 4)

CUB argues, contrary to Staff's assertion, that the repeal of Sections 8-402 and 8-404 of the Act does not affect CUB's current proposal. According to CUB, due to the restricted scope of this proceeding, CUB is not proposing that the utilities provide a 20-year energy plan or that Staff evaluate energy plans or conservation programs, despite their merits. CUB says its proposals only call for the Commission to allow these resources to bid into the auction. CUB states that even if it is necessary to demonstrate that utilities fully considered conservation and demand response bids in the modified auction, the repeal of a section of the Act involving 20-year energy plans does not logically preclude Staff from evaluating such a demonstration. (CUB Initial Brief at 9-10; Reply Brief at 4-5)

The repeal of Section 8-404 of the Act, CUB argues, does not hinder its proposals either. Section 8-404 of the Act stated, "the Commission is also authorized to require any public utility to implement energy conservation, demand control, or alternative supply programs … whenever the Commission determines after hearing, that such programs are likely to be cost-effective." CUB says it is not asking the Commission to require that utilities implement any conservation programs themselves. CUB claims it is only proposing that the Commission allow energy efficiency and demand response providers to bid into the auction. (CUB Initial Brief at 10; Reply Brief at 5)

CUB notes that Staff does not recommend that the Commission commence another general proceeding to consider demand response and energy efficiency programs given the open issues regarding the scope of the Commission's authority. Instead, Staff suggests that it would be prudent to define the boundaries of Commission authority regarding oversight of utility-funded demand-side management and energy efficiency programs before opening any related dockets. CUB agrees and requests that the Commission make a definitive ruling on the matter to alleviate Staff's concerns about the "open" nature of the Commission's authority. (CUB Initial Brief at 10; Reply Brief at 5-6)

In its reply brief, CUB asserts that parties' concerns about its proposal to add demand side bidding to the current limited auction process are unfounded. Staff has expressed concerns that the auction can only accommodate supply side products and concludes that the auction should continue to exclude demand side resources. CUB says Staff is correct that the concept of demand side resources is fundamentally different than the concept of supply side resources. CUB states they are fundamentally different ways of meeting customers' electricity needs, supply side resources create electricity, while demand side resources reduce the amount of electricity needed to operate electrical equipment. CUB asserts that demand side and supply side resources are equivalent from the customers' perspective.

CUB argues that customers do not care whether their office is cooled by an old, inefficient air conditioner or a new, super-efficient unit provided by an energy efficiency contractor who bids into the auction; if the office is comfortable, they are indifferent. According to CUB, so long as the energy efficiency and demand response programs that bid into the auction are able to verify the amount of efficiency or response they acquire, they should be able to participate in the same way as generation. CUB urges the Commission to adjust the Illinois procurement system, using CUB's proposals, to accommodate both types of resources. (CUB Reply Brief at 2-3)

CUB also agrees with Staff that it would be impossible to supply a vertical tranche of energy efficiency in the current auction process. CUB says this is the fundamental flaw in the current auction process identified by CUB and remedied by CUB's three-tier auction proposal. According to CUB, allowing energy efficiency providers to "bid a block of energy efficiency options" would allow utilities to acquire low-cost, verifiable, energy efficiency resources that the current auction process excludes. (CUB Reply Brief at 3)

Despite ComEd's promotion of demand response in general, CUB says the development of demand response programs in Illinois is still in its infancy and should be expanded by allowing demand response resources to participate in the auction. CUB says that while ComEd argues that it already adequately addresses demand side resources, ComEd used its own commercial and industrial demand response programs only twice in 2006. CUB claims this is insufficient to secure the full benefits of demand side management for Illinois customers. CUB also says that existing utility-controlled demand response programs do not preclude the use of market-based demand response procurement such as the three-tier bidding process. (CUB Reply Brief at 3)

CUB also proposes an **alternative** to the three-tier bidding process. If the Commission does not choose to adopt the three-tier bidding process, CUB urges it to consider the following proposal to diminish the barriers to demand response created by the current auction. CUB proposes modifying the current auction to create separate auction products for the base, intermediate, and peak loads. CUB believes this modification would alleviate the barriers to demand response resources. CUB states that while demand response reduces peak load, it is practically difficult for specialized demand response providers to fulfill vertical tranches that require them to provide base, intermediate, and peak load. CUB says its proposal eliminates the vertical tranche, and instead allows bidders specializing in dispatchable demand response, such as remotely operated air conditioner cycling, to bid specific resources for the peak auction product only. (CUB Initial Brief at 11)

CUB states that this proposal would not incorporate low-cost energy efficiency products into the Illinois electricity resource mix. CUB says energy efficiency reduces all base, intermediate, and peak load. According to CUB, separately bidding for base, intermediate, and peak load would not give an additional incentive to provide energy efficiency. CUB asserts that this proposal improves on the existing auction, but does not provide as many benefits as the three-tier approach. (CUB Initial Brief at 11)

CUB says that several parties erroneously assert that its proposal to create separate auction products for base, intermediate, and peak load resources is somehow an “alternative” to the auction process and thus, outside the scope of this docket. CUB asserts, however, that its proposal represents an alternative to the current auction process, not an alternative to the auction as a whole.

Further, CUB claims that its proposal addresses the “skyrocketing prices,” and resulting “public outrage,” that arose from the Illinois Procurement Auction and is well within the scope of this docket. While the change represented in CUB’s proposal is significant, CUB asserts that its scale is necessary to match the significant rate increases experienced by Illinois electricity customers because of the current auction process. CUB maintains that these changes are appropriate and within the scope of this proceeding, because the prices that resulted from the auction were unknown during the Procurement Dockets. CUB believes its proposal complies with the Commission’s directive to only raise issues that “address facts or circumstances that are new” in this docket. (CUB Reply Brief at 6)

CUB says that contrary to Staff’s assertions, creating separate auction products for base, intermediate, and peak load resources does not “abandon” reliance on market forces, but instead enhances that reliance by allowing specialized providers who have not previously been able to bid in the Illinois auction to compete. CUB argues that its proposals do not rely on the technocratic hand of utilities and their regulators to determine portfolio management decisions, but instead allow utilities to choose from the full range of supply and demand side options, instead of a portfolio that is artificially limited by the Commission’s current auction process. (CUB Reply Brief at 6-7)

CUB believes its proposal to bid base, intermediate, and peak loads separately is properly within the scope of this docket. The Commission’s Initiating Order stated, “the reviews, recommendations, and suggestions” presented in the public reports of the Auction Manager and Staff are “appropriate examples of the types of issues to be considered in this docket.” (Initiating Order at 5-6) In addition, CUB says the

Commission emphasized that this docket should address issues “directly related to matters that have come to the attention of the parties as a result of the conduct of the auction process itself, or that relate to proposed changes to the auction process to address facts or circumstances that are new or different from those considered in the Procurement Dockets.” (CUB Initial Brief at 11-12)

CUB states that Staff’s own Report considers the issue of the basic product definition – the tranche. According to CUB, Staff acknowledges that the current definition creates some risk for suppliers, but does not discuss the barriers that the use of the tranche creates for demand side resources. The existence of these barriers, CUB asserts, falls directly within the issue of whether the auction should continue to use the tranche as its basic product. While Staff recommends that the auction continue to use the tranche, CUB believes that the Commission should examine this issue further in this docket, in light of the barriers to demand side resources presented by the current auction. (CUB Initial Brief at 12)

CUB says its proposal to modify the auction process to create separate auction products for base, intermediate, and peak load is intended to reduce the prices that result from the auction. According to CUB, the prices that resulted from the current auction, and the resulting public outrage, were not known during the Procurement Dockets. CUB claims its proposed auction modification will reduce these auction prices and is, consequently, properly within the scope of this docket. CUB argues that because its proposal directly addresses the issues raised in Staff’s Report and facts that were not known during the Procurement Dockets, it is within the scope of this docket as described by the Commission in its Initiating Order. (CUB Initial Brief at 12, citing Initiating Order at 5-6)

2. AG’s Position

In its Reply Brief, the AG says CUB offers useful recommendations to reduce the cost of meeting load by incorporating energy efficiency and demand side management into the procurement process. According to the AG, CUB correctly points out that energy efficiency and demand-response programs provide significant consumer benefits that should be part of any procurement method. The AG shares CUB’s view that energy efficiency and demand-response measures should be procured when ever the cost of such measures is less than or equal to the cost of purchasing electricity. (AG Reply Brief at 1)

The AG states that CUB recommends that the Commission allow procurement by category of supply, i.e. base load, intermediate load and peak. The AG agrees that this proposal would alleviate barriers to energy efficiency and demand response programs. The AG claims that overall procurement costs can be reduced by constructing a diverse electricity supply portfolio that includes horizontal products such a long term, cost-based contracts. (AG Reply Brief at 3)

3. ComEd's Position

ComEd supports Staff's recommendation in its Post-Auction Public Report, dated December 6, 2006, that the Commission continue entrusting the detailed methodology for setting starting prices to the Auction Manager, in consultation with Staff. (ComEd Initial Brief at 16)

ComEd urges the Commission not to modify the auction because of demand-side bidding. ComEd argues that continuing development of demand-response resources is not only successful, but also entirely compatible with the current auction process. ComEd claims the evidence does not justify demand-related alterations of that process. (ComEd Initial Brief at 16)

ComEd asserts that it promotes demand response in general. ComEd says it strongly supports the role of such response in efficient market designs, and has been an industry leader for many years in fostering the growth of demand response resources from within ComEd's customer base. ComEd also notes PJM's industry leadership in including demand response in the selection of capacity resources to serve load across PJM. ComEd claims it has successfully encouraged demand response across all customer segments, and such resources have been bid into PJM's capacity auction to fully realize their value. According to ComEd, these efforts are consistent with both the current auction design and the PJM market design. (ComEd Initial Brief at 16-17; Reply Brief at 11)

ComEd argues that CUB wishes to upset the auction process by injecting demand response. CUB recommends having electric utilities select and manage a portfolio of different resources to meet different utility system needs including all cost-effective demand-side resources before procuring generation resources. ComEd alleges this approach has no merit and should be rejected. (ComEd Initial Brief at 17)

ComEd asserts that CUB's proposal is unnecessary. ComEd claims the auction has been compatible with efficient demand management and nothing suggests the contrary. ComEd contends there is no inconsistency as a matter of policy between a full requirements auction and promotion of efficient demand management. According to ComEd, CUB has failed to flesh out its suggestions in ways that could allow them to be carefully weighed and considered, or combined with the current procurement process. ComEd states that CUB's proposal could modify the auction process in material but not clear ways. ComEd asserts that CUB's ideas are too far-reaching and complex and too ill-formed to be considered in the context of this proceeding. (ComEd Initial Brief at 17-18; Reply Brief at 12)

ComEd suggests that CUB's particular proposal might be inherently incompatible with the auction process. ComEd states that at its core, that process places the risks of portfolio management on the suppliers for good policy reasons fully explored by the Commission in the decisions. ComEd alleges that in contrast, CUB's proposition would divide responsibility for – and risks of – managing various portfolios of energy efficiency programs, demand-response resources and load-following-supply side resources in unknown and potentially misaligned ways between the utility and the suppliers of each type of resource. (ComEd Initial Brief at 18; Reply Brief at 13)

ComEd claims that CUB rejects the fundamental notion of competitive procurement of full-requirements supply at revealed wholesale market prices. ComEd argues that under this notion, market incentives imposed on suppliers spur them to create the lowest-cost portfolio and hold them financially responsible for the consequences of their bids. ComEd states that utilities cannot earn any return on supply contract costs, nor expect (with the exception of a prudence review) to assume supply portfolio risk. ComEd says that CUB's proposal would require significant utility portfolio management and administrative planning functions inconsistent with the approved auction and inconsistent with the notion of the utility's providing supply at no risk and with no return. ComEd alleges that this policy would be costly, would be inconsistent with Illinois' regulatory framework, and would create economic and regulatory inefficiencies not in the best interest of consumers. (ComEd Initial Brief at 18-19; Reply Brief at 13-14)

According to ComEd, even though optimal reliance on demand-side resources could help reduce consumers' electricity bills in Illinois, the Commission should not risk the benefits the competitive auction brings by eliminating its ability to demand that suppliers provide the best overall price to serve ComEd load or by transferring the management of portfolio risk away from the market and back to utilities. (ComEd Initial Brief at 19)

In its Reply Brief, ComEd says CUB can point to no demand program that has been barred or impaired by the Auction or any action of ComEd. ComEd asserts that CUB even acknowledges ComEd's efforts to promote demand response. According to ComEd, CUB still wants to undo the "highly successful" auction process based on the notion that it is required to promote energy efficiency and demand response. ComEd disputes CUB's claim that the current auction process somehow hinders full participation of these demand-side programs in the Illinois electric markets. ComEd says CUB suggests a new, untested three-tier process, under which the utility would purchase energy efficiency and demand response resources in the first two tiers, and then would procure other resources through the generating resource auction. (ComEd Reply Brief at 12)

4. Ameren's Position

Ameren believes the declining price auction is a workable means to bring the lowest overall cost to consumers. Ameren notes that the use of these auctions as a viable means of competitively procuring products and services is recognized beyond the limited scope of the Illinois Auction. Ameren says Senate Bill 1620 was recently introduced in the 95th General Assembly. It would, Ameren claims, amend the Illinois Procurement Code and authorize state agencies to use a reverse auction as the means by which to procure needed supplies. (Ameren Initial Brief at 33)

CUB proposes to use energy efficiency and demand response in Illinois as a part of a procurement strategy; however, Ameren suggests there may not be enough time to implement those strategies. Ameren says it does not necessarily disagree that such benefits exist at some level, but differs in opinion as to their immediate bearing on the upcoming auction itself. (Ameren Initial Brief at 34)

Ameren argues that there is no feasible way to introduce CUB's three tier proposal as part of the 2008 auction. Ameren also doubts the merits of CUB's proposal. Ameren says that even assuming there are suppliers that will offer energy efficiency options, there is no guarantee how and to what degree customers' actual load requirements or usage patterns will be changed, especially lacking any historical context. The second auction for peak products, Ameren argues, provides no assurance of cost benefits. Suppliers attempting to formulate bids for such a product, Ameren alleges, would be faced with great uncertainty on what they were actually obligated to serve and would price such uncertainty into their bids. Ameren asserts that the resulting price could include premiums which significantly reduce any potential benefit gained by such an energy efficiency program. (Ameren Initial Brief at 34-35)

Ameren says the CUB alternative proposal includes an auction that calls for peak, base and intermediate load products to be bid separately. While it is conceivably possible to design an auction that includes these separate products, or a large number of products, Ameren argues that it is uncertain as to the benefits and to the ultimate cost borne by customers. One of the benefits of the current auction design, Ameren claims, is that it has been structured to encourage supplier participation. The competitiveness of the process, Ameren contends, is enhanced by having many suppliers competing. Ameren expresses concern that segmenting the auction as CUB proposes may result in fewer suppliers competing for a given product, which could increase the price for that product. (Ameren Initial Brief at 35)

Ameren expresses an additional concern about the lack of interchangeability among these products in the auction. Ameren contends that another feature of the current auction is that products are designed to be interchangeable so that suppliers can shift their bids round by round among very similar products, helping all the products to settle at market. It is unlikely, Ameren argues, that suppliers would view peak, base-load and intermediate-load products as interchangeable. (Ameren Initial Brief at 35)

5. Staff's Position

Staff states that if it is determined that energy efficiency and demand response should be more heavily relied upon by ComEd and Ameren, it agrees entirely with CUB that the least desirable approach would be to implement it within the existing auction framework. Staff asserts that the concept of demand side resources is fundamentally different than the concept of supply side resources. Staff claims there is no direct way of measuring a reduction in electricity demand and even if such measurement problems could be adequately solved, it would be simply impossible to "supply" a vertical tranche of energy efficiency (which presumably would be a constant portion of load in every hour of the year that has been reduced). Staff believes the provision of demand side resource cannot be adequately compared against the supply of vertical tranches in a manner that would enable them both to be treated interchangeably in the same auction. (Staff Initial Brief at 15-16)

While not expressing an opinion on whether utilities should be committing greater dollars and relying more heavily upon energy efficiency and demand response, Staff says it agrees with CUB that such matters would be better suited for a separate docket. Staff also notes that the Staff's infrastructure for evaluating energy plans and conservation programs was eliminated shortly after the 1997 repeal of Sections 8-402 and 8-404 of the Act. According to Staff, Section 8-402 required utilities to provide 20-year energy plans, and to include in those plans, among other things, "a demonstration that the plan fully considers and utilizes all available, practical and economical conservation, renewable resources, cogeneration and improvements in energy efficiency."

Staff indicates that Section 8-402(e) required the Commission to hold hearings on the plans, and Section 8-402(f) allowed the Commission to choose a plan that would result in the greatest likelihood of providing adequate, efficient, reliable and environmentally safe energy services at the least cost to consumers. Staff further indicated that Section 8-404 stated that irrespective of any energy plan submitted or adopted pursuant to the provisions of Section 8-402, the Commission was also authorized to require any public utility to implement energy conservation, demand control, or alternative supply programs, including but not limited to, programs promoting energy efficient light bulbs and motors, whenever the Commission determined after hearing, that such programs were likely to be cost-effective. (Staff Initial Brief at 17-18; Reply Brief at 13-14)

It is Staff's position that changes to the Act such as the repeal of Sections 8-402 and 8-404 raise issues regarding the current scope of the Commission's authority with respect to its oversight of utility-funded demand-side management programs. Staff observes that the Commission's Initiating Orders in Docket Nos. 06-0388 and 06-0389 appeared to recognize that such issues exist by stating in each order that the Commission only wanted to consider energy efficiency and demand response proposals. Staff contends that such issues may have played a role in the Commission's decision to dismiss those dockets on its own motion on October 12, 2006, prior to reaching any conclusions. (Staff Initial Brief at 18)

Staff states that in addition to repealing Sections 8-402 and 8-404 of the Act, P.A. 90-561 created an Energy Efficiency Trust Fund, to be funded by Illinois electric utilities, and managed by the Illinois Department of Commerce and Community Affairs rather than utilities or the Commission. By virtue of P.A. 90-561, Staff says the legislature revised certain aspects of the Commission's authority and responsibility with respect to demand management and energy efficiency. (Staff Reply Brief at 14)

Staff states that P.A. 94-977, which became effective June 30, 2006, amended Section 16-107 of the Act, which generally deals with real-time pricing. Staff states that these changes to the Act provide for an independent administrator of a real-time pricing program that may provide energy efficiency services, as long as the compensation for those services comes from participants in the program receiving such services. Staff emphasizes that it is not the utility that provides energy efficiency services under this recent legislative change. (Staff Reply Brief at 14-15)

The Commission, Staff argues, only has those powers given it by the legislature through the PUA. (Union Electric Co. v. Illinois Commerce Comm'n, 77 Ill. 2d 364, 383 (1979)) Thus, P.A. 90-561 and P.A. 94-977 raise several questions for Staff regarding the scope and extent of the Commission's authority with respect to energy efficiency/demand response programs. It is not clear to Staff if the Commission can require Illinois utilities to offer energy efficiency or demand response programs.

According to Staff, CUB asserts that it is not asking the Commission to require the utilities to implement any conservation programs; however, by proposing that the energy efficiency and demand response providers be allowed to bid in the auction, Staff says CUB is asking the Commission to require the utilities to purchase and offer energy efficiency and demand response programs. With the repeal of Section 8-404, which authorized the Commission to require any public utility to implement energy conservation, demand control, or alternative supply programs, Staff is not certain that the Commission has the authority to require the utilities to purchase and offer energy efficiency and demand response programs through the auction process. (Staff Reply Brief at 15-16)

Staff also expresses concern about whether the Commission can require all customers to pay for efficiency and demand response programs that only benefit a small group of customers. Staff notes that in enacting P.A. 94-977, the Legislature provided that energy efficiency services may be provided as long as the compensation for such services is paid for by "participants in the program receiving such services." (Staff Reply Brief at 16)

Subject to applicable legal standards, Staff generally supports a broad interpretation of the Commission's authority so as to promote and ensure the provision of adequate, efficient, reliable, environmentally safe and least-cost public utility service under the Act. However, Staff understands that there are limits to the Commission's authority. In this instance, given that the Legislature has repealed the specific sections in the Act relating to energy efficiency/demand response programs without replacing such sections with similar authority, Staff is not certain whether CUB's proposal could be subsumed within the Commission's authority to ensure just and reasonable rates. Furthermore, in light of the Legislature's actions in P.A. 94-977, it seems to Staff that the Legislature is moving in the opposite direction. (Staff Reply Brief at 16)

Staff states that as explained in Caterpillar Finance Corp. v. Ryan, 266 Ill. App. 3d 312, 318-319 (3rd Dist. 1994), the legislature's intent in repealing a specific statutory authorization is assumed to be the elimination of that specific authority. (Staff Reply Brief at 16-17)

Staff notes that the Legislature did not repeal Section 8-401 which imposes a duty on utilities to "provide service and facilities which are in all respects adequate, efficient, reliable and environmentally safe and which, consistent with these obligations, constitute the least-cost means of meeting the utility's service obligations." Staff says Illinois Courts have recognized that Sections 8-401, 8-402 and 8-404 addressed similar but different powers. (City of Chicago v. Illinois Commerce Comm'n, 233 Ill. App. 3d 992 (1 Dist. 1992)) Staff argues that applying the above-referenced cases and concepts to the instant case, the repeal of Section 8-404 would indicate that the legislature intended to eliminate the specific authority previously granted by that Section.

Staff observes that the Commission continues to have the power and authority conferred by Section 8-401 (as well as the general ratemaking authority of Section 9-201). While Staff would agree that the Commission has some authority with respect to demand response and energy efficiency pursuant to Section 8-401, Staff would also submit that the repeal of Sections 8-402 and 8-404 calls into question the scope of the Commission's authority to impose requirements previously authorized by those Sections. (Staff Reply Brief at 17-18)

In conclusion, Staff recommends that the Commission reject CUB's proposed three-tier approach.

Staff also recommends that the Commission not commence another general proceeding to consider demand response and energy efficiency programs given the open issues regarding the scope of the Commission's authority, and the current Staff resources to address those issues. If the Commission were inclined to open another round of dockets to examine the economic merits of demand response and energy efficiency programs, Staff believes it would be prudent to first define the boundaries of what the Act allows with respect to Commission oversight of utility-funded demand-side management and energy efficiency programs. (Staff Initial Brief at 18)

With regard to CUB's alternative proposal (a base-load, peak-load, intermediate-load procurement process), Staff claims that proposal is tantamount to abandoning the basic policy inherent in the Illinois Auction. Staff argues that it would abandon the policy of relying on market forces and self-interested suppliers guiding investment and generation portfolio management decisions. Staff says it would return to relying on the technocratic hand of utilities and their regulators, which would shift risk back from suppliers to ratepayers. According to Staff, not only does CUB's third option constitute a collateral attack on the policy approach adopted by the Commission in the Procurement Dockets, it is also beyond the scope of the current docket, which was initiated to improve upon the Illinois Auction rather than to replace it entirely with a partially-specified alternative. Staff recommends that CUB's proposed base-load, peak-load, intermediate-load procurement process not be adopted at this time. (Staff Initial Brief at 24)

Staff says CUB's own witness, Mr. Crandall, ranked this as the worst of his three proposals and referred to it as "only a partial solution." (Id., citing CUB Ex. 2.0 at 16-17) Staff states that while CUB acknowledges certain disadvantages of this proposal relative to its three-tier approach, CUB fails to mention the most pressing disadvantages. Staff argues that there is no evidence showing that the proposal would reduce the price of power passed on to ratepayers. Staff claims there is no evidence supporting the appropriate portions of base, intermediate, and peak loads. Staff complains that CUB provides no details of how the proposal would be implemented, and there is no proposed timeline for accomplishing all the tasks that would be necessary to develop such details. (Staff Reply Brief at 21-22)

6. Commission Analysis and Conclusions

CUB proposes to modify the Fixed Price Section of the auction to allow the use of demand side bidding. CUB's proposed three-tier bidding approach would split the auction into three consecutive sections.

First the utilities would hold an auction to purchase a block of cost effective energy efficiency. Next, the utilities would determine the shape and amount of the remaining load, and would hold an auction to purchase all of the dispatchable, peak-reducing demand response resources that they perceive to be cost effective. Next, the utilities would again determine their remaining needs, and the resulting load curve would become the basis for the third tier auction for generation supply. (CUB Initial Brief at 3-4)

ComEd, Ameren and Staff oppose CUB's proposed three-tier approach for the reasons summarized above.

The Commission has reviewed the record regarding the three-tier approach advanced by CUB. While the Commission firmly believes in the importance of developing demand response resources for reasons aptly articulated by CUB and others, the Commission finds that it would be premature to adopt the CUB proposal at this time. As parties who oppose it suggest, there is insufficient detail with respect to this far-reaching proposal to allow for a thorough review of it, to ascertain whether the approach is in fact compatible with the auction process, or to determine if there is enough time to implement all the steps that comprise it as part of the next auction.

In addition, as Staff suggests, there are questions about whether the Commission has the authority under current law to mandate the type of demand-based program recommended by CUB. The Commission agrees this issue should be more fully addressed before any such approach is further considered for adoption.

As indicated above, CUB also proposes an alternative to the three-tier bidding process, in the event the Commission does not adopt the three-tier process. Under its alternative plan, CUB proposes modifying the current auction to create separate auction products for the base, intermediate, and peak loads.

Staff and Ameren oppose CUB's alternative plan for a number of reasons as described above.

Having reviewed the arguments, the Commission finds that CUB's alternative proposal should not be adopted. As Staff and Ameren observe, the proposal is substantially different from the type of auction approved in the Procurement Orders, and there is insufficient information in the record to determine how it would be implemented, what timeline would be required or how supplier participation or the price of power are likely to be affected. While the Commission believes CUB has advanced an interesting proposal, it is not clear that use of such a process would result in an adequate supply of reasonably priced electricity, particular for residential customers. The Commission cannot take the risk of implementing such an untested proposal at this time.

C. Hourly Price Section in Auction

The 2006 Auction included two sections: a fixed price section and an hourly price section. Each section included the products for Commonwealth Edison Company and the Ameren Illinois Utilities. The Ameren product in the hourly price section was the BGS-LRTP product, which is a full requirements supply product to serve those customers with peak demands at or above 1 MW, who did not choose either the fixed priced option (BGS-LFP) or to take supply from a Retail Electric Supplier ("RES").

Unlike the fixed price section, the results of the hourly price section were not approved by the Commission due to various concerns. Rather, Ameren and ComEd have been procuring resources to provide hourly price services under the contingency provisions of their respective tariffs. (Staff Ex. 1.0 at 9)

In the instant proceeding, parties addressed whether an hourly price section should be included in the 2008 Auction, and if so, whether improvements should be made to it.

1. ComEd's Position

Following the 2006 Auction, the Commission initiated an investigation into the Hourly Price Section of the Auction. This required ComEd to implement a contingency purchasing process to serve its hourly load obligations. ComEd is currently purchasing resources to serve customers taking service under Rate BES-H directly from PJM administered-markets.

ComEd recommended that it be allowed to continue to procure supply for its hourly priced retail load directly from PJM rather than an Hourly Priced Product in the auction. With the institution of the Reliability Pricing Model ("RPM") program approved by the Federal Energy Regulatory Commission ("FERC") to become effective June 1, 2007, ComEd can now procure directly from PJM-administered markets electric energy, capacity, ancillary services and all other such requirements to serve retail customers taking service under Rate BES-H – Basic Electric Service – Hourly ("Rate BES H"). (ComEd Initial Brief at 2-3)

ComEd asserts that procurement directly from PJM-administered markets is an efficient and effective means of procuring those resources for customers who are on hourly priced rates. No party opposed this recommendation.

2. Ameren's Position

Ameren identified three factors that it believes contributed to the lower than expected level of interest in the hourly auction product: 1) uncertainty of the expected supply obligation; 2) the risks borne by suppliers; and 3) costs borne by suppliers related to customers taking service from a RES.

Ameren presented testimony that more detail should be included in the tariffs on how purchases of power and energy from bilateral markets will occur in the event of a contingency, in the form of an appendix added to Rider MV.

With respect to possible improvements to the hourly price product, Ameren offered recommendations that could make the BGS-LRTP product more attractive in the auction: (1) reduce the uncertainty of load served by capping the amount of Hourly Price capacity with both an upper and lower limit (for example 200 to 500 MW); (2) remove components that create risk for the suppliers, such as ancillary services, which could be addressed through a "pass-through" mechanism; (3) use seasonal payment factors for capacity in an effort to mitigate risk borne by the suppliers that is created by customers switching on and off the hourly product on a seasonal basis because seasonal payment factors better reflect the actual cost of capacity at the time it is being used. (Ameren Initial Brief at 12-13)

Ameren asserts that while these recommendations should make the BGS-LRTP product more attractive to suppliers in the auction, it is unlikely that they would increase the level of interest to levels sufficient to satisfy the concerns that led to the Commission opening an investigation of the results of the hourly price section of the first Illinois Auction. For that reason, Ameren supports Staff's recommendation to procure supply for the BGS-LRTP product outside the auction until such time as these alternative processes can be fully evaluated. (Ameren Initial Brief at 12-13; Reply Brief at 7-8)

3. Staff's Position

According to Staff, while Ameren witness Blessing discussed three changes that could improve upon the hourly price auction, he nevertheless concluded that these changes would be unlikely to sufficiently satisfy the concerns that led to the Commission initiating an investigation of the results of the hourly price section of the first Illinois Auction. Staff believes these changes would only marginally enhance bidders' responses to the hurly price product.

Accordingly, Staff believes the 2008 Illinois Auction should not include a mechanism for procuring electric power and energy for the hourly priced retail customers of Ameren and ComEd. Rather, the Commission should order (i) that Ameren and ComEd modify their respective tariffs to exclude the hourly price section from the Illinois Auction until otherwise ordered by the Commission, and (ii) that Ameren and ComEd should continue to use their best efforts to prudently acquire the resources needed to provide hourly price services without the Illinois Auction pursuant to the contingency provisions of their tariffs. (Staff Initial Brief at 5-6)

4. IIEC's Position

IIEC does not object to the approach ComEd was using to acquire the products needed to provide hourly service outside the context of the auction.

While IIEC had some problems with Ameren's approach at that time, Ameren has made separate filings with the Commission that would resolve IIEC's concerns. IIEC indicates that the Commission's approval of those filings in Dockets 07-0204, 07-0205, and 07-0206, has resolved IIEC's concerns.

IIEC agrees with Staff and Ameren that the possible improvements to the hourly price auction, that were discussed by Ameren witness Blessing, would not satisfy the Commission's concerns about the hourly auction. (IIEC Initial Brief at 6; Reply Brief at 3-4)

5. Commission Analysis and Conclusions

As explained above, following its review of the 2006 Auction prices, the Commission rejected the results of the hourly price section of the 2006 Auction. In the instant docket, various potential improvements in the hourly price section were explored. Ultimately, however, no party recommended that an hourly price section be included in the 2008 Auction. As the parties suggest, there is no indication that the modifications considered were likely to materially increase bidder interest and mitigate bidder risks and risk premiums.

Accordingly, Staff and other parties who addressed the issue recommend, and the Commission agrees, that no hourly price section be included in the 2008 Auction. Instead, Ameren and ComEd shall continue to use their best efforts to prudently acquire the resources needed to provide hourly price services pursuant to relevant provisions of their tariffs.

D. Information Dissemination to Prospective Bidders

Dr. LaCasse made several other recommendations to modify and improve the dissemination of information to prospective bidders and others. First, she recommended that the 2006 Web site be archived to an accessible location, and update the Illinois Auction Web site for the 2008 auction. There was also a recommendation to add an information session well in advance of the Part 1 Application. There was a recommendation to invite all stakeholders to the first information session conducted well in advance of qualification and direct information dissemination efforts to the public and press during that period. It was suggested that additional documentation should be provided targeted on areas that generated a high volume of questions in the prior Illinois Auction (tariff and switching rules, end of auction process, and examples for auction rules).

Dr. LaCasse also recommended improving the pages of the General Information section of the Web site and including new summary documents that provide a comprehensive overview of the auction for the general public and for the press. Dr. LaCasse explained that, during the 2006 Auction, general stakeholders asked a number of basic questions that were already answered through the Web site. The press, in particular, did not appear to make use of the materials available. This may be an indication that the information was not sufficiently easy to find or was presented in a way that was too technical. The new information materials will be specially designed to educate all stakeholders, the press and the general public on the auction and main issues of concern to them.

Dr. LaCasse also suggested providing a summary and overview of the auction for the general public and for the press. She also proposed providing updates regarding the auction process to all stakeholders between the Part 1 Application deadline and the auction through pre-scheduled conference calls or web casts. These events would feature a presentation by the Auction Manager team on items of most interest to general stakeholders, including the progress of the application process. This would also provide an organized forum for all stakeholders to receive information regarding the auction process at the same time. General stakeholders would have an opportunity to ask questions of the Auction Manager, the utilities, and the Commission Staff regarding the auction process in general and the progress to date. The calls or web casts would also allow an expeditious response to press information requests and questions.

It was also suggested that updated switching statistics and hourly load data be provided in the next auction. In addition, it was recommended that CPP-A suppliers be provided at an earlier time with a more certain estimate of CPP-A customer load that reflects the results of customer actions during the enrollment window.

The Commission has reviewed the recommendations made by Dr. LaCasse as described above. It appears that no party opposes those recommendations, and the Commission believes they will enhance the auction process. The Commission, therefore, approves these proposed changes.

Dr. LaCasse made other recommendations intended to improve the process of disseminating information to potential bidders, starting with the second information sessions shortly before the Part 1 Application.

ComEd supports those recommendations. As the auction process progresses toward the Part 1 Application deadline, the information needs of prospective suppliers grow and the number of questions submitted to the Auction Manager increases significantly. ComEd says prospective suppliers need information to evaluate the auction opportunity, to decide whether to participate in the process, to understand the application process, and to prepare their bids. ComEd claims these inquiries are time sensitive and failure to respond to them promptly can affect participation in the auction and, ultimately, the goal of obtaining reliable supply at competitive market prices. (ComEd Initial Brief at 74)

According to ComEd, this focus on the important needs of potential suppliers would be accomplished by giving priority to questions from prospective suppliers, as well as their consultants and financial institutions, starting at the juncture of the second information sessions. ComEd says their questions would be answered first with a target turnaround time of two business days while questions from other stakeholders would be answered next with a target turnaround time of five business days.

ComEd suggests that the second information sessions held shortly before the Part 1 Application deadline would be targeted exclusively to prospective suppliers. ComEd says they would be aimed at promoting the auction opportunity for prospective suppliers and explaining the economic opportunity from their standpoint, providing details of the Supplier Forward Contracts (“SFCs”), the bidding rules, and the application process to get prospective suppliers ready to decide whether to submit a Part 1 Application. According to ComEd, the success of these second information sessions will be enhanced by focusing the content of the presentations on topics of most interest to prospective suppliers and by encouraging and allowing the maximum number of questions from prospective suppliers to the Auction Manager, the utilities, as well as Staff. (ComEd Initial Brief at 75)

Upon reviewing the record, it appears to the Commission that the Auction Manager’s proposal to improve the process of disseminating information to potential bidders, starting with the second information sessions shortly before the Part 1 Application, is not in dispute. The Commission concludes that this proposal is reasonable and it is hereby approved.

ComEd also supports Dr. LaCasse’s recommendation to restrict attendance at the second information sessions held shortly before the Part 1 Application to the Auction Manager team, the Staff, the utilities and prospective bidders. ComEd believes that making these “bidder-only” meetings recognizes that the information being presented is technical in nature and is specifically targeted to getting prospective suppliers ready for the application process.

ComEd further asserts that a session with content targeted to prospective suppliers and attended by prospective suppliers is most likely to generate a high volume of questions and to result in the dissemination of needed information. ComEd claims the success in disseminating this information can directly impact the participation in the application process and ultimately the participation in the auction. (ComEd Initial Brief at 75-76)

Having reviewed the record, it appears to the Commission that the Auction Manager's proposal to limit participation in the second information sessions before the Part 1 Application is not currently contested. The Commission does not anticipate any significant adverse consequences from this change. The Commission finds that this proposal is likely to improve the dissemination of information to prospective suppliers and it is hereby approved.

E. Duration of Supply Contracts for Residential and Small Commercial Auction Segments

1. Staff's Position

To accommodate an ultimate plan for rolling three-year contracts, one third of which expire each year, the initial auction held in September 2006 included 17-month, 29-month, and 41-month contracts, each contract type in sum covering one-third of the eligible load. Starting with the next auction, the fixed price contracts were all to have three year terms, with one-third of the eligible load available each auction. (Staff Brief at 51)

In the current docket, Staff expressed concern that relying solely on three-year contracts may have the unintended effect of deterring some suppliers from bidding in future Illinois Auctions. Staff suggests that some suppliers have a comparative advantage in making shorter-term commitments, while other bidders have a comparative advantage in making longer-term commitments. Staff warns that the use of only three-year contracts may deter participation by the supplier who may have a comparative advantage in making shorter-term commitments. On the other hand, Staff asserts that moving entirely to one-year contracts for the small to medium sized customer groups may deter participation by the supplier who may have a comparative advantage in making longer-term commitments. (Staff Initial Brief at 51)

In future auctions, Staff proposes to utilize a blend of 1-year, 2-year, and 3-year contracts. Staff recommends targeting an eventual mix of 50% 1-year, 20% 2-year (10% per auction), and 30% 3-year contracts (10% per auction). Staff believes this mix would solicit more bidder interest, greater competition, and lower supply costs in the upcoming auctions, while still providing adequate inter-year price stability. (Staff Initial Brief at 52)

Ameren and ComEd first proposed using a blend of 1-year and 3-year contracts. However, during cross examination, Mr. Blessing expressed support for the Staff alternative and indicated that the Staff alternative would support the twin goals of market-based rates that are stable for residential and small business customers and also attract the maximum amount of interest in the auction (Staff Initial Brief at 52, citing Tr. 328-330). Both Mr. McNeil and Dr. LaCasse also testified that they had no opposition to the Staff proposal. (Id., citing Tr. 543 and 488; ComEd Initial Brief at 58-59)

2. DES-CEI's and RESA's Positions

According to DES-CEI, the Commission need not and should not endorse the theory that long-term contracts are necessary to mitigate pricing risk for electricity consumers. DES-CEI argues that, generally, they are not. DES-CEI say parties that oppose the adoption of a shorter-term procurement contract structure argue that long-term contracts are needed to protect customers, in part, from volatile market swings. DES-CEI claims the reality is that long-term contracts do not provide such protection and will not prevent default customers from eventually experiencing significant price changes due to price adjustments in the wholesale market. Customers, under any contract mix being considered, DES-CEI asserts, ultimately will pay market prices. (DES-CEI Initial Brief at 5-6)

The salient question for the Commission, DES-CEI contend, is: should customers experience market prices more closely tied to the time the prices are set, or should customers absorb the premiums assessed by suppliers in an effort to provide customers a static multi-year price? DES-CEI urges the Commission to direct the utilities to adopt a balance of short-term procurement contracts that provides more market-reflective pricing than the existing long-term contract structure currently in place in Illinois. Regardless of the proposal the Commission adopts in this proceeding, DES-CEI further urges the Commission to signal that, over time, the Commission intends to make the default service supplied by the blended products more market-reflective. (DES-CEI Initial Brief at 6)

DES-CEI asserts that the 2006 Auction demonstrated that long-term contracts can subject customers to prices that are significantly higher than prices obtained through shorter-term agreements. According to DES-CEI, none of the proponents of long-term procurement contracts provide any evidence to suggest that Illinois customers are adverse to prices that are more market-reflective than those that result from the longer-term contracts in the Illinois Auction. DES-CEI suggests that suppliers will be bearing an enormous amount of risk relating to fuel costs, wholesale market uncertainty, retail market uncertainty and other factors, all focused solely on a time period three years hence. DES-CEI further contends that determining expected load over the course of a long-tem contract to cover a three-year period is likely problematic. DES-CEI state that shorter-term contracts more directly reflect the periodic movements of the markets, and will not bear the burden of premiums suppliers assign to longer-term procurement agreements. (DES-CEI Initial Brief at 6-7)

According to DES-CEI, the length of the contracts that are being proposed by Staff and the utilities would require suppliers to face ongoing exposure to the following risks over a multi-year period: the obligation to provide “load following” service to a set of customers; customer migration risk; anticipated switching that does not occur; counterparty credit risk; potential changes in laws and regulations; changes in regional transmission organization charges; the Commission finding the auction not prudent or rejecting the auction results; administrative and legal costs associated with learning about the auction, satisfying the eligibility requirements and preparing a bid; capacity charges; litigation related to the validity of the auction and related appeals; the weather; changes in fuel prices; economic impacts (economic downturns resulting in customers going out of business, as well as improved economic customers resulting in increased usage); and new, unknown risks. (DES-CEI Initial Brief at 7)

DES-CEI states that although the reduction of the length of the Illinois Auction procurement contracts would not completely eliminate all the risk premiums embedded in the prices derived from the Illinois Auction, some price mitigation would be expected to occur. With shorter-term contracts, DES-CEI suggests that competition is more likely to develop, so that to the extent the premiums are “high,” customers will have alternatives. (DES-CEI Initial Brief at 7)

According to DES-CEI, auctions that are entirely comprised of long-term contracts act as rolling rate-freezes that inhibit the development of a vibrant, sustainable competitive retail market and result in wholesale prices being disconnected from retail prices, preventing changes in market price from impacting customer usage. DES-CEI argues that because the long-term default contract structure inhibits (or prohibits) the development of competition throughout the duration of a long-term contract, customers are locked-in to that auction price. Should that auction price be higher than the price otherwise available to customers via shorter-term agreements (as is currently the case in Illinois), DES-CEI asserts customers are harmed, ironically in DES-CEI’s view, by a structure proposed to provide them security.

Conversely, should a long-term auction contract be set during a temporary dip in the wholesale market, DES-CEI says customers may enjoy the benefits of lower-than-market prices for a period, unaware that a potentially significant rate increase lies in wait several months down the road. According to DES-CEI, competitive suppliers cannot sustain a business in a marketplace that provides customers with power at a below-market price. (DES-CEI Initial Brief at 8; Reply Brief at 6)

DES-CEI argues that in markets where rates for residential default service sufficiently reflect market-based changes in wholesale prices, customers are assured that their default service rates will not be locked in at above market prices for extended periods of time. The short-term, monthly contracts for pricing retail electric products in New York and the comparable monthly product pricing for natural gas in Illinois, DES-CEI contends, both provide examples of how short-term contracts can be implemented to the benefit of customers. The fact that the utility default rate will not be locked in at below-market prices for extended periods of time assures competitive suppliers operate in such markets, DES-CEI asserts. DES-CEI claims that competitive suppliers are more willing to enter into, and invest resources in, markets where there will be an ongoing opportunity to compete against a market-reflective default service. (DES-CEI Initial Brief at 8-9; Reply Brief at 7)

DES-CEI asserts that that default structures based upon long-term contracts can impose substantial harm on the development of competitive markets. DES-CEI argue that proposals for a blend of single-year and multi-year products create retail price signals that become stale over time, bear little relationship to actual energy market conditions, and fail to adequately mitigate risk to customers. (DES-CEI Initial Brief at 9)

According to DES-CEI, Staff and the utilities offer little evidentiary support as to how relying upon long-term contract arrangements will assist in the development of competition for customers in Illinois. DES-CEI says they simply assert that long-term prices work to the benefit of customers, provide suppliers with flexibility, and provide customers with security from the fluctuation of volatile wholesale electric markets. In DES-CEI's view, experience in the 2006 Auction, and from states that have adopted similar constructs, demonstrates that default rates based upon long-term contracts do not benefit customers. DES-CEI asserts that the use of long-term contracts has resulted in "high" prices for the utilities' blended products and in the elimination of competitive options for residential and small commercial customers. The implementation of long-term contracts in New Jersey, DES-CEI claims, had similar, results. (DES-CEI Initial Brief at 9-10; Reply Brief at 7-8)

DES-CEI argues that without market-reflective prices, customers have no choice of suppliers, no choice of competitive or alternative products, and no incentive to choose how and when to use their energy. On the other hand, an Illinois Auction structure that includes more market-reflective contracts would result in: (i) a reduced risk of "price shock" for customers; (ii) the development of more competitive options for customers; (iii) environmental benefits; and (iv) greater flexibility for the Commission to revise future auction structures. DES-CEI believes the results of the 2006 Auction show that long-term contracts alone are not the answer. (DES-CEI Initial Brief at 10-11)

In DES-CEI's view, the results of the 2006 Auction support the conclusion that price movements over shorter contract terms more likely would result in smaller variations in price than static prices held in place by long-term contracts. DES-CEI says that because the wholesale price of electricity can change dramatically throughout the course of long-term contracts, locking-in long-term prices for customers' risks creates a "price shock" at the expiration of a long-term contract, when suppliers seek to charge a new market rate which likely has changed dramatically. DES-CEI asserts that conversely, shorter-term contracts help ensure that prices are refreshed more frequently and, therefore, that contract prices more accurately reflect the state of wholesale markets. Unless the Commission orders a revision of the Illinois Auction contract structure, DES-CEI claims price shock will be an ongoing part of the discussion regarding Illinois' electricity markets every year that long-term contracts expire and new auction prices take effect. (DES-CEI Initial Brief at 11; Reply Brief at 9)

DES-CEI suggests that rather than trying to define the perfect blend of risk and price for all customers, the Commission should strive to design a structure that empowers individual customers to make their own choices based on their own risk tolerance and needs with respect to price, variability, and term. DES-CEI says the Commission should seek to develop "an efficient frontier," where customers can see substantial benefits in exchange for a limited amount of risk. (DES-CEI Initial Brief at 11)

According to DES-CEI, the use of long-term wholesale contracts by definition results in a long-term impact on the default rates based upon a "snap shot in time" of market conditions. DES-CEI claims that long-term obligation threatens the business viability of RESs, creating a serious obstacle for RESs considering entering the Illinois market for residential and small commercial customers. DES-CEI claims that each auction runs a risk of producing a set of long-term default rates against which alternative suppliers for residential and small commercial customers cannot compete effectively. In DES-CEI's view, this structure discourages RESs from entering the Illinois small commercial and residential market. (DES-CEI Initial Brief at 12; Reply Brief at 9)

In order to derive the maximum benefits of competition, DES-CEI claims a structurally sound market should offer consumers a variety of products from a number of suppliers. Whether fixed, hourly, green, or comprised of other customized attributes, such products allow customers to enjoy the innovations of retail electric competition, providing flexibility and choice. With the expiration of the rate freeze, DES-CEI says the majority of industrial and large commercial customers in Illinois have switched to an alternative supplier, entered into competitive agreements, and chosen from an array of products and services that are tailored to meet their individual needs. Residential and small commercial customers, DES-CEI states, should be afforded these same opportunities. DES-CEI asserts that more market-reflective prices will bring new entrants to the Illinois market, and with those new entrants will come innovative products designed to meet the supply requirements of individual customers. (DES-CEI Initial Brief at 12)

According to DES-CEI, more market-reflective prices derived from shorter-term contracts encourage the most efficient use of electricity and are good for the environment. When accurate price signals exist, DES-CEI asserts that customers are more responsive to those signals, are much more invested in the process of choosing when and under what circumstances to use energy, and are much more keenly aware of the implications and advantages of conservation. DES-CEI states that for instance, in summer months, when monthly pricing variations are higher, consumers who are provided with more market-reflective prices will be more likely to conserve electricity during peak periods, thereby lowering peak demand and average energy prices, and decreasing the amount of pollutants discharged into the atmosphere. DES-CEI says the long-term fixed prices resulting from the 2006 Auction shield customers from the actual cost of energy, include costly premiums, remove much of the seasonal variation in electricity prices and provide no incentive for customers to vary their use accordingly. (DES-CEI Initial Brief at 13; Reply Brief at 10)

DES-CEI asserts that frequent updating of Illinois Auction prices through shorter-term contracts would lower the overall cost of electricity for all customers, provide customers with the incentive to invest in energy efficiency, reduce energy consumption, conserve valuable resources, and allow customers to better manage their energy costs. DES-CEI recommends that the Commission order a more diverse portfolio of auction products that allow customers to actively manage their energy usage and provide for the environmental benefits that follow. (DES-CEI Initial Brief at 13)

DES-CEI suggests that endorsing the use of short-term contracts in the Illinois Auction will provide significant flexibility to the Commission. According to DES-CEI, there are significant administrative burdens associated with addressing residential and small commercial customers' concerns when those customers are locked into long-term contracts that they perceive to be at a "high" price. (DES-CEI Initial Brief at 14; Reply Brief at 10)

In its Reply Brief, DES-CEI states that in support of their position, the proponents of long-term contracts assert that such contracts would solicit more bidder interest in the upcoming auctions and provide adequate inter-year price stability. DES-CEI asserts that the Proponents of Long-Term Contracts fail to present any survey, study or analysis to support their assertions. (DES-CEI Reply Brief at 4)

RESA supports the arguments of DES-CEI. According to RESA, the Commission should encourage the use of short term contracts (i.e. contracts with less than one year duration) because (1) long term contracts to do not mitigate price risk for customers; (2) more market-reflective contracts benefit customers and the development of competition because they reduce the risk of price shock, provide more competitive options, provide environmental benefits and provide more Commission flexibility. (RESA Initial Brief at 8)

3. ComEd's Position

ComEd recommends that the Commission approve use of a mix of 1-year, 2-year, and 3-year contracts for the fixed price product in the 2008 Illinois Auction. ComEd says that while Staff initially suggested the possibility of using successive 1-year agreements, it no longer supports that approach and Staff now recommends use of a combination of 1-year, 2-year and 3-year contracts. ComEd indicates that Staff recommends targeting an eventual mix of 50% 1-year, 20% 2-year (10% per auction), and 30% 3-year (10% per auction); ComEd has no objection to that proposal. (ComEd Reply Brief at 27)

ComEd says DES and CEI, with the support of RESA, argue that the Commission should rely entirely on short-term contracts to provide supply for residential and small commercial customers. Their approach, ComEd argues, would deprive customers of the careful balance between price stability and market sensitivity that the fixed price product was designed to provide. According to ComEd, the DES approach of relying on short-term contracts was rejected by the Commission in Docket 05-0159, and it should be rejected here. (ComEd Reply Brief at 28)

4. Ameren's Position

Ameren states that consistent with Staff's Initial Brief at page 52, Ameren does not object to Staff's proposal to procure 50% of the BGS-FP load using 1-year contracts, 20% using 2-year contracts, and 30% using 3-year contracts. Ameren claims that DES-CEI's arguments in support of shorter contract terms merely rehash the same arguments made, and which the Commission properly rejected, in Dockets 05-0160, 05-0161, and 05-0162. In those dockets, Ameren says the Commission found that the short-term contract mix supported by DES was not the best option for protecting consumers from "price unpredictability and instability." (Ameren Reply Brief at 18)

According to Ameren, the record in this docket similarly does not support DES-CEI's proposal to adopt short-term wholesale contracts. Ameren asserts that the proposed longer-term mix of 1-, 2-, and 3-year contracts incorporates longer-term, and thus more stable, trends in energy pricing, and is designed to protect consumers from short-term volatility in energy prices. Ameren supports the Commission's continued adoption of a longer-term mix of contract options, as supported by Staff, Ameren, ComEd, and Midwest Gen/EMMT. (Ameren Reply Brief at 18)

Ameren asserts that a new mixed portfolio, once fully implemented, will provide slightly less price stability for this customer group in exchange for a larger variety of products in each auction, and, it is hoped, thus an increase in bidder interest. (Ameren Initial Brief at 35-26)

Ameren states that in the first Illinois Auction, supply to serve the load of the R&SB customers was procured for three supply periods: the first for 17 months, the second for 29 months and the third for 41 months, each representing approximately one-third of the load of these customers. Ameren says these overlapping supply periods were selected to allow Ameren to transition into overlapping three-year contracts. Under this ladder approach, each expiring contract would be replaced by a new three-year contract, thereby resulting in roughly one-third of the supply to serve the load of the R&SB customers being procured each year. Ameren asserts that this approach provides market-based prices for this customer group while at the same time provides some price stability once the process is established. (Ameren Initial Brief at 36)

Ameren was concerned that Staff's initial approach to procure contracts for one-year delivery periods that cover different time periods, which was later revised as described above, would cause some suppliers to be disinterested in committing to supply a one-year contract with deliveries beginning more than two years after the close of the auction. Based on this lack of interest, Ameren says suppliers may choose to reduce their participation in the auction or not participate at all in order to avoid getting stuck serving a product with deliveries beginning more than two years in the future. Ameren claims that a supplier who is only interested in serving the full three-year term would bid equal quantities of each of the three one-year contracts in the auction in order to get to the three-year supply obligation it desires.

Ameren says that as long as the average price of the three contracts remains at or above the price at which the supplier is willing to supply for the three-year term, then the supplier is fine. But, Ameren argues, if the average price were to drop below the price the supplier is willing to supply, the supplier would want to withdraw some or all of the tranches from all three products. Ameren claims the supplier gets stuck if, because there are other suppliers bidding only on the contracts for year one and/or year two, there is excess supply for the year one contract and excess supply for the year-two contract but no excess supply for the year three contract.

In this case, Ameren says the supplier withdrawing some or all of its tranches from all three products would have withdrawal approved for the year-one product and the year-two product but his withdrawal denied for the year-three product. Ameren adds that if no tranches are switched to the year-three product in subsequent rounds of the auction, that supplier would be stuck serving a product it does not want to serve. According to Ameren, while this might tend to drive the auction price lower by providing additional incentive to this type of supplier to keep bidding on all three products at lower prices, it is also possible that this type of supplier could choose to reduce his level of participation in the auction or choose not to participate at all, which would likely result in higher final auction prices. (Ameren Initial Brief at 36-37)

Ameren continues to believe that for this group of customers the price should be market based yet reasonably stable. At the same time, Ameren argues, the auction products should be designed to attract the maximum amount of interest in the auction. Ameren does not object to Staff's proposal to procure 50% of the BGS-FP load using 1-year contracts, 20% with 2-year contracts, and 30% using 3-year products. (Ameren Initial Brief at 37-38)

Transitioning from overlapping three-year contracts for 100% of the load to a new mixed portfolio, Ameren states, would require the 35 tranches of BGS-FP load that will be up for bid in the next auction would be procured as follows: In the January 2008 Illinois Auction, Ameren says nine tranches representing approximately 450 MW of BGS-FP load would be procured using a supply period of one year. The remaining 26 tranches would be procured using a supply period of three years, according to Ameren. Then, in the 2009 Illinois Auction, when there would be a total of 45 tranches up for bid (36 tranches from the 2006 Illinois Auction and nine tranches from the 2008 Illinois Auction). Of these, Ameren says 18 tranches, representing approximately 900 MW of BGS-FP load, would be procured using a one-year supply period, and the remaining 27 tranches would be procured using a three-year supply period. Finally, in the 2010 Illinois Auction, Ameren states that the transition would be complete and Ameren would procure 27 tranches using a one-year supply period and 27 tranches using a three-year supply period. (Ameren Initial Brief at 38)

According to Ameren, the results of the supplier survey on auction improvements, conducted by the Auction Manager, indicates some support from suppliers for a mix of one- and three-year supply periods. Ameren says Section II of that survey asked suppliers to rank three supply period options: Option A – Ladder of 36-Month Contracts; Option B – Consecutive 12-Month Contracts and Option C – 12-Month and 36-Month Contracts. Of the 13 suppliers who responded to this section of the survey, Ameren states that all 13 ranked Option C as their first or second preferred option. In contrast, seven suppliers ranked Option A as their least preferred and six suppliers ranked Option B as their least preferred. In addition, Ameren indicates four suppliers indicated that Option A would reduce or preclude their participation in future auctions. (Ameren Initial Brief at 38-39)

5. EMMT/Midwest Gen's Position

In its Reply Brief, Midwest Gen says it continues to believe that the current structuring of contract lengths is appropriate; however, it does not object to the proposals to alter the contract lengths in future auctions to provide a combination of one-, two-, and three-year contracts for the Fixed Price section of the Auction. (EMMT/Midwest Gen Reply Brief at 10)

Midwest Gen says DES-CEI contend that contracts with short durations allow service to be more market-reflective. According to Midwest Gen, however, the proposal to rely solely on contracts shorter than one-year in duration subjects customers to the possibility of drastic pricing changes. Midwest Gen asserts that longer-term contracts, such as three-year terms, benefit consumers by insulating the customers from short-term changes in pricing that may not reflect the longer-term trends. Offering contracts of different lengths, Midwest Gen argues, will allow pricing to be responsive to the needs of the market, while also providing suppliers with the opportunity to utilize longer term contracts to mitigate the risk from price variations.

In Midwest Gen's view, the proposal to limit contracts to durations of shorter than one-year would deprive suppliers of the flexibility to use their discretion in managing risk by negating their ability to adopt a mix of short and longer term contracts. (EMMT/Midwest Gen Reply Brief at 10-11)

6. Commission Analysis and Conclusions

As explained by Staff, the initial auction held in September 2006 included a blend of 17-month, 29-month, and 41-month contracts. Each covered one-third of the eligible load. Starting with the next auction, all new fixed price contracts were to have three-year terms, with one-third of the total eligible load to be obtained in each auction. (Staff Brief at 51)

Use of the overlapping contracts in the three-year rolling procurement structure was intended to help protect against price instability for smaller customers. (Ameren Procurement Order at 129)

In the current docket, Staff expressed concern that relying solely on three-year contracts may have the unintended effect of deterring some suppliers from bidding in future Illinois Auctions. Instead, Staff proposes to utilize a blend of 1-year, 2-year, and 3-year contracts. Staff recommends targeting an eventual mix of 50% 1-year, 20% 2-year (10% per auction), and 30% 3-year contracts (10% per auction). Staff believes this mix would solicit more bidder interest, greater competition, and lower supply costs in the upcoming auctions, while still providing adequate inter-year price stability.

The positions of Staff and the other parties who addressed this issue are summarized above. Ultimately, ComEd and Ameren generally concurred in the Staff proposal. DES-CEI and RESA, on the other hand, argue for greater use of short-term contracts.

Having reviewed the record, the Commission finds that the Staff proposal is designed to stimulate bidder participation while still providing a reasonable level of practicality and price stability. Of the recommendations of record, Staff's strikes the best balance of these objectives, and it should be adopted, except as otherwise provided elsewhere in this Order. The Commission finds that the proposals to rely more heavily on short-term contracts should not be adopted at this time due to the likely adverse impact on customers, particularly smaller customers.

F. Determination of Auction Segments for Customer Groups

1. Combining Ameren 400 kW to 1 MW Customers with Larger Customers

a. Staff's Position

According to Staff, in the Procurement Dockets the Commission accepted recommendations from Staff and other parties to combine ComEd's 400 kW to 1 MW customer group with ComEd's 1 MW to 3 MW customer group. Together, these two groups made up ComEd's CPP-A group, whereas customers below 400 kW comprised ComEd's CPP-B group. (Staff Initial Brief at 53)

In Ameren's case, Staff says that due to the lack of hourly metering on all 400 kW to 1 MW customers, the Commission found that the analogous proposal to combine these customers with larger customers would be impractical. However, the Commission agreed with Staff that given the relatively low cost of installing the necessary metering, Ameren should be required to begin the process of installing such meters, and to complete that process within two years. The Commission further concluded that the proposal to combine the 400 kW to 1 MW customers with the larger customers may appropriately be revisited in subsequent auctions when the necessary data is available by virtue of metering or other means. (Staff Initial Brief at 53)

Staff's review of the most current switching statistics indicates to it that the majority of Ameren's 400 kW to 1 MW customers have not switched to ARES, whereas the vast majority of Ameren's above 1 MW customers have switched; the 400 kW to 1 MW customers only represent 6 percent of the total kilowatt hours on Ameren's BGS-FP service. Staff expresses concern that Ameren's 400 kW to 1 MW customers have more to lose by being grouped with larger customers then they had to gain by such a change. Given that concern, Staff recommends against combining Ameren's 400 kW to 1 MW customers with Ameren's above 1 MW customers, at this time. Staff notes that IIEC also argues that the 400 kW to 1 MW group should not be combined with the above 1 MW group. Staff says no witnesses expressed any opposition to this testimony. Hence, Staff recommends that the Commission not combine Ameren's 400 kW to 1 MW customers with Ameren's above 1 MW customers, at this time. (Staff Initial Brief at 53-54)

b. IIEC's Position

IIEC opposes combining Ameren 400 kW to 1 MW customers with larger customers for several reasons. First, IIEC says suppliers bidding in the auction apparently perceive a significant difference between the load and risk characteristics of the 400 kW to 1 MW customers and those of the over 1 MW customers on the Ameren system. IIEC claims this is evident from the significant difference in the auction prices for these two customer groups – $66.05 per MW for 400-1,000 kW customers versus $84.95 per MW for customers over 1 MW. IIEC claims that it does not appear from September Auction prices that it would be beneficial to the 400 kW to 1 MW customer group to place them in the same group as the 1 MW and over customers on the Ameren system. It could, IIEC asserts, expose them unnecessarily to the substantial risk premiums implicit in the auction results for 1 MW and over customers. (IIEC Initial Brief at 12)

Second, IIEC argues that large customers would actually prefer to remain in their own grouping since they are likely to have risk and load profiles that differ significantly from those of the commercial and small manufacturing customers in the 400 kW to 1 MW group. Third, IIEC says that Staff raised the possibility of combining these two customer groups in the recommendations presented in its auction report to the Commission; however, in this case, Staff no longer proposes to combine these customer groups because it believes that the 400 kW to 1 MW customers potentially have more to lose than to gain by being grouped with the 1 MW and over customers. (IIEC Initial Brief at 12)

In its Reply Brief, IIEC indicates that Ameren does not specifically address this issue, but recommends creation of a customer group consisting of customers from 150 kW to 1000 kW. (IIEC Reply Brief at 16, citing Ameren Initial Brief at 53-54) No other party appears to have addressed this issue; therefore, IIEC recommends that the 400 kW to 1 MW customers in the Ameren service territory not be combined with the 1 MW and over customer group in this case.

c. AG's Position

The AG says it agrees with IIEC that 400-1,000 kW customers should not be exposed to higher prices by combining them with the over 1 MW customers. The AG believes risks associated with customer switching should not be borne by customers who lack choice. (AG Reply Brief at 5)

d. Commission Analysis and Conclusions

As explained above, in the ComEd procurement docket, the Commission approved a proposal to combine ComEd's 400 kW to 1 MW customer group with its 1 MW to 3 MW group.

In the Ameren procurement docket, the Commission did not adopt a proposal to combine Ameren's 400 kW to 1 MW customer group with customers over 1 MW, noting an absence of data due to a lack of hourly load profile metering. The Commission found that the proposal could be revisited in subsequent auction dockets when the necessary data is available by virtue of load profile metering or other means. To that end, the Commission ordered Ameren to begin installing such metering and to complete that process within two years. (Ameren procurement order at 132-133)

Having reviewed the record, the Commission finds that Ameren's 400 kW to 1 MW customers should not be combined with larger customers in the instant docket. As indicated by Staff, IIEC and the AG, it appears that combining the groups would not be beneficial to the 400 kW to 1 MW customers because it would expose them to risk premiums associated with greater switching by the larger customers.

2. Separate Auction Segment for Residential and Small Business Customers

a. CUB's Position

CUB proposes changing the customer supply group definitions to create separate auction products for smaller customers. CUB states that the auction price includes a risk premium that results, at least partly, from the ability of larger customers to switch suppliers. CUB suggests that separating smaller customers, many of whom cannot switch suppliers, would protect these customers from this risk premium and the associated increase in the auction price. (CUB Initial Brief at 13)

CUB asserts that practically speaking, a separate auction product should be constructed for (1) Ameren DS-1 and DS-2 customers and (2) ComEd's Residential and Small Load Customer Groups. CUB says Ameren's DS-1 and DS-2 customers demand up to 150 kW and ComEd's Residential and Small Load Customer Groups demand up to 100 kW. Both Ameren and ComEd, CUB claims, have indicated in testimony that they do not object to such a division of the current customer class definitions. In addition, CUB says Staff does not oppose such a division of the current customer class definitions. (CUB Initial Brief at 13)

CUB indicates that Staff has expressed general concerns that dividing the customer class definition raises certain measurement concerns. CUB asserts that its testimony should alleviate Staff's stated concerns. CUB states that to compute the hourly load served under the new customer class' auction contract, the utilities would need to take a representative sample of metering data from customers in the new customer class. Alternatively, CUB says utilities would need to install hourly meters for every member of the customer class. CUB states that at the evidentiary hearing, Ameren witness Mr. Blessing and ComEd witness Mr. McNeil both stated that their utilities are currently able to take the representative sample of metering data needed to implement the change in customer class definitions. (CUB Initial Brief at 13-14, citing Tr. 332 and Tr. 519)

In its Reply Brief, CUB states that CES presented four guiding principles for determining appropriate customer groupings in this docket. CUB believes that the second principle, favoring the grouping of similar customers together, is particularly important. CUB believes that grouping customers with similar switching risks together will reduce the risk reflected in the auction prices. CUB says this is largely because residential customers currently have no choices in the market and small business customers have very little choice, in contrast to the competitive alternatives available to larger customers. CUB says Ameren, ComEd, and Staff do not object to this proposal, and are currently able to implement it. CUB urges the Commission to change the customer group definitions to separate residential and small business customers from larger customers who have switching opportunities. (CUB Reply Brief at 7-8)

b. ComEd's Position

CUB proposed that ComEd construct a separate auction product for its Residential and Small Load Customer Group (customers with demands up to 100 kW) in order to isolate those customers from the volumetric uncertainty associated with larger customers' ability to switch. ComEd believes this is a reasonable proposal and offers the following approach to accomplish the objectives that CUB identified.

First, ComEd proposes to separate the load of the CPP-B eligible customers into two distinct groups. One group would include the load of the Residential Customer Group, the Watt-Hour Customer Group, the Small Load Customer Group, Dusk to Dawn Lighting and General Lighting as defined in Rider CPP. Generally, these are the residential and small business customers with demands of 100 KW or less. The other group would consist of the Medium Load Customer Group, also as defined in Rider CPP. These customers are the non-residential customers with demands greater than 100 kW, but less than 400 kW. There are approximately 18,000 customers and 2,400 MW of eligible load in the Medium Load Customer Group. (ComEd Initial Brief at 59-60)

ComEd proposes that both of these groups would be in the CPP Blended Segment of the auction. That is, the products procured and the term structures of those products would be identical for each group. ComEd says if the mix of products for the Blended Auction Segment were a mix of 1, 2, and 3-year contract terms, there would be a total of 6 products in the Blended Auction Segment under this proposal. ComEd also proposes that the switching rules for the customers in the Medium Load Customer Group remain unchanged. That is, those customers can leave ComEd's CPP-B bundled service (not the PPO) at any time, but if they return to ComEd's CPP-B bundled service, there would be a 12-month minimum stay requirement. (ComEd Initial Brief at 60)

ComEd proposes to create a new group within the Blended Auction Segment rather than shifting those customers into the Annual Auction Segment because, in this docket, many changes have been proposed to the terms and conditions of Rate BES-NRA. These include a shortened enrollment window; elimination of the ability to switch to a RES outside the enrollment window; a pre-auction survey allowing customers to elect a 7-day or 20-day enrollment window; and assuming sufficient interest in the 7-day enrollment window, the creation of two separate CPP-A auction products. ComEd says there are approximately 6,000 customers affected by these changes, and those customers will have been operating under somewhat similar rules for over one year prior to the next enrollment window. (ComEd Initial Brief at 60-61)

This change, ComEd says, will affect approximately 18,000 smaller customers who have not had to be concerned about making choices during an enrollment window, and most of these customers have never taken service from a RES. According to ComEd, the concerns that it expressed about the possibility of customer confusion when surveying the larger customers about a 7-day or 20-day enrollment window would be significantly amplified for these smaller customers. Therefore, in order to achieve CUB's objective of isolating residential customers from volumetric uncertainty (migration risk), while minimizing the changes for the smaller business customers in the Medium Load Customer Group, ComEd believes its proposal strikes the right balance. (ComEd Initial Brief at 61)

In its Reply Brief, ComEd recommends that the Commission not adopt Staff's suggestion to utilize only 1-year contracts to supply medium-sized non-residential customers, discussed below. (ComEd Reply Brief at 28, citing Staff Initial Brief at 56-57) ComEd asserts that extending the benefits of the blended product to these customers is appropriate. ComEd says that although Staff notes that Ameren relies on 1-year agreements, the goal of achieving uniformity with the Ameren approach does not justify denying customers benefits they would otherwise receive. ComEd believes a reasonable number of tranches will be available with use of the blended product and that it is not necessary to resort to 1-year contracts to achieve that objective.

c. Ameren's Position

Ameren does not object to dividing the Residential and Small Business ("R&SB") customer group into two customer procurement groups: 1) including all residential customer and those non-residential customers with peak demands up to and including 150 kW; and 2) including those non-residential customers with peak demand greater the 150 kW up to including 1,000 kW. If the Commission were to accept CUB's recommendation, Ameren would propose procuring the residential and non-residential with peak demands up to and including 150 kW with a mix of one-year and three-year contract supply periods for the reasons discussed in Mr. Blessing's direct testimony. For the customer group which includes non-residential customers greater than 150 kW and up to and including 1000 kW, Ameren recommends procuring 100% of the supply using one-year contract supply periods. (Ameren Initial Brief at 53-54; Reply Brief at 19)

d. Staff's Position

While Staff is not opposed to the Ameren and ComEd recommendations for implementing the CUB proposal, Staff notes that Ameren and ComEd approaches are not uniform; the former subjects Ameren's medium-sized non-residential customers to 1-year wholesale supply contracts while the latter subjects ComEd's medium-sized non-residential customers to whatever blend of contracts is deemed appropriate for the smaller customers. Staff also notes that its proposal for smaller customers is a blend of 50% 1-year, 20% 2-year (10% each auction), and 30% 3-year contracts (10% each auction); hence the ComEd recommendation would double that for ComEd's medium sized customers. Staff states that adding in the very large customer groups would leave seven different auction contracts for ComEd, and five for Ameren, for a total of twelve different contracts included in the same auction. (Staff Initial Brief at 56)

Furthermore, Staff notes that the percentage of 100 kW to 400 kW customers and load remaining on ComEd's fixed price service is less than 50%. Hence, of the 2,400 MW of eligible load, Staff suggests that no more than 1,200 MW will be available for winning suppliers. Staff states that if that 1,200 MW is bought exclusively through 1-year contracts for 50 MW tranches that would amount to 24 tranches up for auction. In contrast, Staff says if that 1,200 MW is further split into sub-categories of 50% 1-year, 10% 2-year, and 10% 3-year contracts, there can only be twelve 50 MW tranches of 1-year contracts and 2.4 each of the 2-year and 3-year contracts. Hence, to maintain greater uniformity between the Ameren and ComEd supply contracts, to slightly simplify the process, and to retain a reasonable number of tranches available through the auction for each separate product, Staff recommends that ComEd, like Ameren, utilize only 1-year wholesale supply contracts for its medium sized customers. (Staff Initial Brief at 56-57)

e. Dynegy's Position

In its Reply Brief, Dynegy expressed concern about the continued fragmentation of the auction products: Dynegy asserts that this type of segmentation may well lower the risk premiums for some of the new customer groups; however, it may also have the unintended consequence of raising the final price to serve each of the new groups, not just those with higher propensities to switch. Dynegy suggests if the new groups become too small, then suppliers may well find winning a percentage of a small group's total load may not be as attractive an endeavor not only because the load shape for that group may be such that it is more expensive to serve but, more generally, the small load itself may be more expensive to serve.

Dynegy cautions against so fragmenting the customer groups that suppliers become less willing to bid in the Auction and would rather participate in other procurement opportunities. As the Commission decides how many auction products (based on various combinations of contract lengths, customer classes and enrollment groups), Dynegy urges it to consider the impact such segmentation will have on supplier participation in any given product. (Dynegy Reply Brief at 10-11)

f. CES's Position

In its Reply Brief, CES states that CUB's proposals to redefine customer class groupings appear to comport with the goals outlined by CES. As the CES understands CUB proposals, ComEd and Ameren would create separate Auction products for their respective residential and small commercial customers. For ComEd, this new Auction product would consist of small commercial customers with annual demands less than 100 kW; for Ameren, this new Auction product would consist of small commercial customers with annual demands less than 150 kW. CES says that although CUB's proposed customer class groupings appear appropriate, the Commission should clarify that all customers who default to the utilities' respective fixed-price products may switch to an alternative supplier at any time, even outside of the enrollment window period. (CES Reply Brief at 19-20)

CES says CUB's proposal to create a separate auction product for Ameren's residential and small commercial customers appears to be appropriate. CES says it suggests one slight modification regarding the related migration rules. CES recommends that the Commission explicitly state that Ameren's Annual Product customers that default to Ameren's BGS-LFP product can switch to RES service outside of the enrollment window. (CES Reply Brief at 20-21)

It appears to CES that the CUB's proposed customer class groupings for ComEd likewise would be appropriate with a modification similar to that which CES advocates for Ameren. (CES Reply Brief at 21-22)

g. AG's Position

The AG supports CUB's recommendation for separating customer groups so that residential and small commercial customers that present no switching risk are protected from the risk premiums associated with switching. In the AG's view, any method used to procure electricity in the future must protect those customers that have no or few competitive choices from risk premiums associated with switching by customers who have relatively more options. (AG Reply Brief at 5)

h. Commission Analysis and Conclusions

As explained above, CUB proposes changing the customer supply group definitions to create separate auction products or segments for smaller customers. CUB asserts that the auction price includes a risk premium that results, at least in part, from the ability of larger customers to switch suppliers. CUB suggests that separating smaller customers would protect them from this risk premium and the associated increase in the auction price. (CUB Initial Brief at 13)

ComEd and Ameren offered proposals to regroup customers in a manner intended to accomplish the objectives identified by CUB. Their proposals are summarized above.

Staff recommended one change in the ComEd proposal. Staff recommends that ComEd utilize only one-year wholesale supply contracts for its medium-size non-residential customers, as is proposed by Ameren. ComEd opposes Staff's modification.

Having reviewed the record, the Commission agrees with CUB that separate auction products should be used for smaller customers in order to protect them from the price premium associated with switching risk. The separation of customer groups should be implemented in the manner proposed by ComEd and Ameren.

With respect to the issue of contract lengths related thereto, the Commission finds that the use of one-year wholesale supply contracts for medium-size non-residential customers would be appropriate for both Ameren and ComEd. As Staff suggests, doing so would help achieve uniformity, simplify the process, accommodate switching between the Ameren and ComEd auction segments, and retain a reasonable number of tranches for each product.

3. Auction Segment Based on Enrollment Window

a. IIEC's Position

As a component of its recommendation that large customers be given the option to select a seven-day enrollment window, which is discussed in a separate section later in this order, IIEC also recommends that customers' choice of enrollment window be used to segment them into separate auction product groups. Under IIEC's proposal, each of the two groups of customers would take a distinct, separate auction product. The first group would be those customers who are price-sensitive and elect, at their option, to take the steps required to operate within the seven-day enrollment window. The second group would consist of those customers who, for their own administrative or other reasons, need a longer period of time to decide on their supply options and choose or default to the longer enrollment period. (IIEC Initial Brief at 13)

IIEC says that while Ameren acknowledges the merit of dividing customers into separate segments based on the enrollment window they select, Ameren proposes in addition that the Auction Manager, in consultation with the Staff and the utility, have the flexibility (a) to use two segments (instead of the three originally proposed) or (b) to combine the two segment loads into a single product if separate products are not feasible. (IIEC Initial Brief at 13)

IIEC says under Ameren's proposal, where two segments are maintained, the first product would be based on the load of customers selecting the seven-day enrollment window load in the pre-qualification process. The second product would be based on the load associated with the longer 20-day enrollment window, again using customers' choices in the pre-qualification process. IIEC adds that a customer certifying its load as eligible for the fixed price auction could check a seven-day enrollment window box or a 20-day enrollment window box on the notice provided to Ameren. IIEC says this information would be provided to the utility one week before the Auction Manager announced the tranche sizes for the auction. According to IIEC, Staff, the Auction Manager and the utility would review the results of the pre-qualification process, and if there was sufficient load to fill at least one tranche in each product, the customers would be divided into two groups. (IIEC Initial Brief at 14)

IIEC indicates that ComEd suggests essentially the same approach. ComEd recommends that if there is insufficient load for the seven-day enrollment window product, customers would default to the 20-day enrollment procedure, and all CPP-A load would be combined in a single auction product.

IIEC has no objection to the approach recommended by Ameren and ComEd on this matter. IIIEC says it recognizes the need to establish a procedure that ensures sufficient load for a viable auction product for customers who are able, at their option, to select a seven-day enrollment window. IIEC indicates that utility witnesses have testified that the utilities are capable of implementing this approach and that the Auction Manager has also indicated that this approach can be accommodated in the next auction. (IIEC Initial Brief at 14) IIEC states that if its recommendation to allow customers to choose a seven-day enrollment window is adopted, the recommendation to have customers separate themselves into product groups based on enrollment window choices, as modified by the utilities, should be adopted as well. (IIEC Reply Brief at 19)

It is IIEC's position that separate auction products should be available to customers in accordance with their enrollment window selections. IIEC recommends that one product be available for the customers opting for the seven-day enrollment period, and another product be available for those customers selecting or defaulting to the 20-day enrollment period, through the process described by Ameren and ComEd. (IIEC Initial Brief at 15)

b. Ameren's Position

Ameren agrees with IIEC's position that dividing customers based on enrollment requirements may be a good approach, but have concerns with IIEC's proposed products, for several reasons. Ameren asserts it is highly unlikely that any one customer, much less a sufficient number of customers to even come close to constituting at least one full 50 MW tranche, would be willing to pre-commit, prior to the auction, to take a product not knowing the price that will result from the auction. Second, Ameren claims that dividing the load as IIEC has suggested would likely result in one or more products with very little load in them which then may doom those products to failure. (Ameren Initial Brief at 54)

To alleviate these concerns, Ameren recommends, first, eliminating the idea of creating a product for customers who may choose to pre-commit, and second, allowing Ameren and the Auction Manager the flexibility to procure the entire load using a single product or to divide the load into two products (one product for those customers who elect a seven-day enrollment window in the prequalification process and a second product for those customers who elect a longer enrollment window in the prequalification process) based on the results of the prequalification process.

Ameren summarizes its proposal as follows: Ameren would be required to complete a pre-qualification process for all customers with peak demands greater than 1 megawatt. As part of that survey, each customer who elects to make its load eligible for the fixed price product would then be asked to check one of two boxes: 1) that they would like their load included in the seven calendar day enrollment window product; or 2) that they would like their load included in the 20 day enrollment window product. This customer survey would need to be completed at least one week prior to the date that the final tranche size data is announced.

The Auction Manager, in consultation with Ameren and Staff, would then analyze the results and determine if there is a sufficient amount of load (i.e. at least 50 MW of eligible load) in each of the two products to divide the customers, if feasible, into these two products. If the answer is no, a single product would be procured using the enrollment window indicated by the results of the pre-qualification process. (Ameren Initial Brief at 54-55)

c. Staff's Position

According to Staff, CES argued that the IIEC proposal was unnecessary, cumbersome, overly burdensome, and unnecessarily complicated. In Staff's view, however, the testimony of ComEd, Ameren, and IIEC witnesses demonstrates that, at least from the point of view of the utilities and large customers, the IIEC proposal is not excessively cumbersome, burdensome, nor complex, and that it should be implemented. Staff also indicated support for the proposal. Therefore, Staff supports the Ameren/ComEd-modified version of IIEC Stephens' proposal to include within the auction separate large-customer products depending on the choice of enrollment window. (Staff Initial Brief at 57-58)

In its Reply Brief, Staff states that CES repeats its argument that shorter enrollment windows do not reduce risk and would not have any beneficial effect on auction prices. This, Staff says, is the same argument used by CES for its opposition to the 20-day enrollment window and Staff's reply thereto serves equally well to rebut the reoccurrence of CES's argument in the context of the IIEC's 7/20 proposal. (Staff Reply Brief at 36)

According to Staff, CES alleges that practical problems would overwhelm both customers and the auction process itself. (Staff Reply Brief at 36, citing CES Initial Brief at 17) Without accepting the validity of the CES position that the 7/20 proposal is infeasible, Staff would ask the Commission to consider the worst that could happen if CES is correct. Staff states that in that case, the default, which is built into the 7/20 proposal, is to utilize only a 20-day enrollment window. Staff suggests that if CES's practical/logistical problems prove intractable, there is already a solution. (Staff Reply Brief at 36)

d. Commission Analysis and Conclusions

As a corollary to its recommendation that large customers be given the option to select a seven-day enrollment window, which is addressed more fully below in Section IV.A, IIEC recommends that a customer's choice of an enrollment window be used to segment them into separate auction product groups.

The Commission finds that this proposal has the potential to produce lower prices and should be implemented, subject to the modifications proposed by ComEd and Ameren. These modifications would avoid the conduct of a separate auction segment for a product in which there was insufficient interest from the customers it was intended to benefit.

G. Redefinition of Tranche Sizes

1. Staff's Position

As noted above, bidders compete for one or more tranches of product. Each tranche represents a fixed percentage of load. While targeted to achieve a tranche size of 50 MW, the actual size of a tranche can vary depending on switching and other factors.

Staff recommended that the Auction Manager be authorized to redefine, by customer group (such as CPP-B versus CPP-A), the size of tranches prior to the finalization of the auction rules, based on her analysis of the utilities' switching statistics. Rather than each tranche representing approximately 50 MW of eligible load, Staff says each tranche would represent approximately 50 MW of anticipated (or expected) load. According to Staff, the rationale for this change is to maximize the advantages of the simultaneous auction process, where competition among bidders is enhanced by their ability to switch between different products during the auction, as relative prices evolve. (Staff Initial Brief at 60)

Staff suggests that having products of similar size increases the willingness for suppliers to switch between the products, further increasing competition. But, Staff says, it is now clear that under the current process where the 50 MW tranches are based on eligible load, there are significant differences between the products due to the relative propensity for large versus small customers to switch from utility supply to alternative retail supplier supply. Taking ComEd migration figures as an example, Staff notes that the percent of the actual peak load on CPP-A is about 14% of the eligible peak load. Based on these migrations from CPP-A to alternative suppliers, the nominal 50 MW tranche of CPP-A load has turned out to be closer to 7 MW. Staff's proposal is aimed at adjusting tranches so that they are likely to be closer to 50 MW than to 7 MW (using CPP-A as an example). (Staff Initial Brief at 60-61)

Staff says several witnesses supported the basic concept proposed by Staff; however, some witnesses raised concerns, while recommending modifications to address those concerns. in Staff's view, the concern raised by Dynegy witness Mr. Huddleston is unfounded, since, with or without the Staff's proposed modification to tranche sizes, the bidder is still subject to exactly the same risk that he will end up with more load than was expected. Staff says this risk cannot be avoided as long as suppliers are buying vertical tranches. (Staff Initial Brief at 62)

Based on its review of the testimony, Staff recommends that the Commission authorize the Auction Manager to redefine, by customer group, the size of tranches prior to the finalization of the auction rules, based on her analysis of the utilities' switching statistics. Rather than each tranche representing approximately 50 MW of eligible load, Staff says each tranche would represent approximately 50 MW of anticipated (or expected) load. Based more specifically on the testimony of Ameren witness Blessing and Ameren/ComEd witness LaCasse, Staff also recommends that the Auction Manager, after consultation with ComEd, Ameren and Staff, be authorized to use her judgment in creating and/or capping the anticipated (or expected) loads to be utilized for this purpose. (Staff Initial Brief at 62-63)

2. ComEd's Position

ComEd supports Staff's proposal, in general, as it believes that this change could make the bidding process easier for suppliers, since shifting a tranche bid between products would result in approximately the same amount of actual load. ComEd states that the auction manager proposed several modifications to this recommendation that ComEd believes will improve it. (ComEd Initial Brief at 65)

ComEd says that while the auction manager also generally supported this proposal as she believed that tranches of similar size promote the willingness of suppliers to switch across products and favor competition in the Auction, she expressed concerns about determining tranche size based on expected load. ComEd asserts that as a general matter, determining the "expected load" is not a simple task and it would yield at best a potentially wide range of reasonable estimates. ComEd says the expected load for a load category will depend on the price of utility service determined through the Auction – a price that is not known several months before the Auction when the expected load is estimated. The expected load in each load category will depend on load growth and general economic conditions, ComEd says.

ComEd also states that the expected load in each load category will also depend on a number of other factors that are not knowable with much accuracy at the time the estimate is made, such as the price of offerings by RESs, the ability of RESs to market to different types of customers, and the features of the service offered by RESs. ComEd adds that the expected load may also depend on the number of customers that have already secured service from a RES on a multi-year basis, as such customers may not be free to return to utility service during the next enrollment window. (ComEd Initial Brief at 65-66)

It also was not clear to the auction manager just what was meant by the term "expected load." ComEd says for larger non-residential customers, the concept seemed clear; the expected load is a forecast or estimate of the load that would be anticipated during the one-year supply period starting on June 1 after the Auction. ComEd notes that all proposals regarding the term structure for these larger non-residential customers are for a one-year term.

ComEd says that given the proposals by it made in direct testimony, and the current customer switching rules for the Ameren, the load is basically constant throughout the year. Once CPP-A and BGS-LFP customers are on the service at the beginning of the supply period in June 2008, ComEd says they will have to remain on the service to the end of the supply period, barring exceptional circumstances such as a customer leaving the utility territory because it is going out of business. According to ComEd, there is a single quantity to be forecasted for each of the CPP-A and BGS-LFP categories. ComEd claims the determination of this forecasted or expected load likely would yield a wide range of reasonable estimates because of the uncertainty surrounding the factors that are identified above – but the concept is certainly clear for these large non-residential customers. (ComEd Initial Brief at 66)

ComEd claims the concept is not as clear for residential and smaller non-residential customers, for two reasons. First, a CPP-B or a BGS-FP customer can leave during the supply period to take service from a RES, and a customer currently taking service from a RES can return to CPP-B or BGS-FP service (subject to them remaining on the service for one year). According to ComEd, unlike larger non-residential customers, the pool of customers taking the service is not fixed during the supply period; the load could vary with migration.

ComEd says that because there is no single quantity to be forecasted it is then not so clear what expected load is – it could mean the average load over the entire supply period, the average load over the next year, the mid-point of some range of minimum or maximum load, or some other measure. Second, ComEd notes that supply for these customers is procured beyond a one-year horizon. ComEd states that under all proposals for the term structure of the CPP-B and BGS-FP products, whether it be a mix of 1-year and 3-year contracts, or Staff's two alternatives (a mix of 1-year, 2-year, and 3-year contracts, and consecutive one-year contracts), there are multiple product terms in the Auction and the 2008 Auction procures a portion of these customers' needs up to May 2011. With various product terms, ComEd believes it is again not clear what expected load is – it could be determined separately for each contract term included in the Auction, there could be a single measure that applies to all customers in this load category, or something in between. Determining expected load – however defined – to cover a three-year horizon is likely problematic, in ComEd's view. ComEd states that retail markets can be expected to continue to develop and customers can be expected to become more aware of their choices; quantifying these trends is likely to be a difficult task. (ComEd Initial Brief at 67)

ComEd indicates that the auction manager proposed two modifications to Staff's proposal. The first proposed modification is in setting the target for tranches for residential and smaller non-residential customers of the CPP-B and BGS-FP load categories. The auction manager proposed that the tranches for residential and smaller non-residential customers target 50 MW of actual load, by which she meant PJM peak load contribution for the CPP-B customers and the actual MISO peak load for the BGS-FP customers. ComEd says this calculation would be made shortly before tranche targets are finalized, by September 17, 2007 according to the timeline in Auction Manager Ex. 1.9b. The calculation, ComEd adds, would use the actual load for each of the CPP-B and BGS-FP load categories and would apply to all terms or products associated with the load category. According to ComEd, this avoids the necessity to define expected load (i.e., to define the quantity to forecast) and it avoids the necessity to consider this notion over a several-year horizon. (ComEd Initial Brief at 67-68)

The second proposed modification is in setting the target for tranches for larger non-residential customers. ComEd says the auction manager agreed with Staff that the target for these tranches should use an expected load notion that would account for switching statistics, as well as any other relevant information. She proposed that this information be used to obtain a range of reasonable estimates of the expected load for the CPP-A and BGS-LFP load categories. She proposed using the highest of these reasonable estimates to set the number of tranches for the CPP-A and BGS-LFP load categories. According to ComEd, the number of tranches would be set so that the target for the tranche size is 50 MW, in terms of the PJM peak load contribution for the

CPP-A customers and the actual MISO peak load for the BGS-LFP customers. (ComEd Initial Brief at 68)

ComEd says the auction manager believed that her proposal was an improvement over setting tranches based on either actual or eligible load. ComEd believes Staff rightly pointed out that if tranches are set based on eligible load this is likely to lead to tranches for residential and smaller non-residential customers being significantly larger than tranches for larger non-residential customers on an expected and actual load basis. In ComEd's view, the auction manager's proposal addressed this concern by matching the expected size of the tranches for larger non-residential customers to the size of the tranches of the residential and smaller non-residential customers. Staff's proposal addresses this concern as well. (ComEd Initial Brief at 69-70)

ComEd argues that the auction manager's proposal, however, also addressed the opposite concern -- that tranches for residential and smaller non-residential customers would be significantly smaller than tranches for larger non-residential customers. ComEd says it addressed this concern by using the highest reasonable estimate of load to set the tranches for larger non-residential customers. According to ComEd, this minimized the risk that the estimate of expected load used for larger non-residential customers is mistakenly low, so that there would be fewer tranches for larger non-residential customers than there should be, and the tranches for larger non-residential customers would end up being too large. (ComEd Initial Brief at 70)

ComEd states that while actual load could conceivably also be used for the larger nonresidential customers, the auction manager did not believe that this was advisable. ComEd claims that taking actual load as the expected load for larger non-residential customers has an inherent and recognizable bias in that it assumes that there will be minimal changes in the decisions of customers on the basis of the 2008 Auction results or as a result of any further development of the retail market. ComEd notes that various parties have presented several proposals in this proceeding related to the CPP-A and BGS-LFP products with the goal of making these options more economical for consumers.

Should the Commission approve some or all of these improvements, and should they have the hoped-for effects, ComEd says the actual load in September 2007 will underestimate expected load in June 2008. If the number of tranches were set on the basis of actual load for larger non-residential customers, ComEd asserts that there would almost certainly be too few tranches in the Auction for the CPP-A and BGS-LFP load categories, with the result that these tranches would almost certainly be too big. (ComEd Initial Brief at 71)

ComEd states that given current migration statistics, there would be a single tranche for the BGS-LFP load category since there is approximately 50 MW of load currently on this service. In ComEd's view, this highlights the concern opposite from the one that prompted Staff to make its proposal on tranche size. ComEd says that if, following the 2008 Auction, customers were to return to utility service, the tranches that suppliers would have to serve could potentially be much larger than the 50 MW of expected load targeted by Staff. ComEd claims that at the extreme, if all larger non-residential customers were to return to Ameren's service, the tranche would be approximately 1853 MW. According to ComEd, the risk that the actual tranche size would be substantially larger than the target of 50 MW is a risk that suppliers would take into consideration in making their bids and is a risk that would tend to put an upward pressure on the price for these customers. (ComEd Initial Brief at 71-72)

ComEd indicates that the auction manager agreed with Staff's proposal that the methodology for determining the reasonable range of expected load and the maximum bound of the range could be set, as for the decrement formulas, by the Auction Manager in consultation with Staff and the Utilities, before the finalization of the Auction Rules. ComEd says it is appropriate for the details to be set before tranche targets are announced on September 17, 2007, in advance of the Part 1 Application. (ComEd Initial Brief at 72)

3. Ameren's Position

Ameren expressed concern that Staff's proposal may have an unintended negative consequence. Ameren notes that the BGS-LFP product only represents approximately 50 MW of load in total, spread across 37 tranches. Ameren states that if the auction manager were to use these statistics to redefine the tranche size as recommended by Staff, this would result in only one tranche of the BGS-LFP product in the next Illinois Auction with the winner of the one tranche being responsible for serving 100% of the BGS-LFP load. Ameren's concern is that while this single tranche is expected to serve roughly 50 MW of load based on historical switching statistics; the reality is that the supplier who wins this single tranche will be expected to serve 100% of the BGS-LFP actual load up to the full 1850 MW, in the extreme case, that all customers eligible to take the product choose to do so.

Ameren says that while it is unlikely the full 1850 MW of BGS-LFP load would sign up for the product following the next Illinois Auction, it is possible that with the adoption of certain modifications to the product design, such as significantly reducing the time between the close of the auction and the end of the enrollment period, the BGS-LFP tariff could become more economic for eligible customers and a significant amount of load could sign up for the product. Ameren believes this may make suppliers reluctant to bid on this product. (Ameren Initial Brief at 59-60)

Ameren recommends that, if the Commission should decide to accept Staff's proposal to redefine the size of tranches based on the auction manager's analysis of the utilities' switching statistics, an upper limit should be placed on the eligible load that can be included in a tranche. Ameren suggests that upper limit, for example, 300 MW of eligible load, would be determined by the auction manager in consultation with the Staff and Ameren. Ameren supports the recommendations of Dr. LaCasse with respect to the specific methodology of resizing tranches. (Ameren Initial Brief at 60)

4. Dynegy's Position

In its Reply Brief, Dynegy states, "Because Staff's proposal was late to table and has not been fully vetted, we believe it would be more appropriate to defer implementing it at this time and rather allow it to be fully considered as a part of the next improvements case. (Dynegy Reply brief at 13)

Dynegy asserts that Staff's proposal introduces a new risk into the equation. Suppliers, Dynegy says, would face the risk that they may have to serve substantially more load per tranche than the 50 MW nominal value under even normal conditions. Dynegy suggests that the introduction of this new risk will carry with it a cost, which will be passed along to consumers in the form of the auction-clearing price. (Dynegy Reply Brief at 13)

Dynegy asserts that while the Auction Manager's proposed "fixes" to the methodology may well help, they highlight the problems with adopting Staff's proposal at this time. Dynegy says these fixes were first raised in Rebuttal testimony, through no fault of the parties. Because of this, Dynegy says other parties were unable to introduce evidence regarding these fixes or the extent to which they may (or may not) reduce the new risk introduced by Staff's proposal. (Dynegy Reply Brief at 14)

According to Dynegy, Staff's proposal, and the changes to it proposed by the Auction Manager, might represent improvements to the auction process. Dynegy asserts that the record does not demonstrate that, however. Dynegy claims what little there is, shows that a new risk is being introduced into the process. Dynegy advocates not adopting Staff's proposal at this juncture, but rather making it part of the workshop process of the next improvements case. (Dynegy Reply Brief at 14)

5. Commission Analysis and Conclusions

As explained above, Staff recommended that the Auction Manager be authorized to redefine, by customer group, the size of tranches prior to the finalization of the auction rules, based on her analysis of the utilities' switching statistics. Rather than each tranche representing approximately 50 MW of eligible load, Staff says each tranche would represent approximately 50 MW of anticipated (or expected) load. According to Staff, the rationale for this change is to maximize the advantages of the simultaneous auction process, where competition among bidders is enhanced by their ability to switch between different products during the auction, as relative prices evolve. (Staff Initial Brief at 60)

ComEd and Ameren generally support the Staff proposal, provided that two modifications offered by the Auction Manager are adopted. These modifications are intended in part to address difficulties in determining expected load. In the first modification, the Auction Manager proposed that the tranches for residential and smaller non-residential customers target 50 MW of actual load, by which she meant

PJM peak load contribution for the CPP-B customers and the actual MISO peak load for the BGS-FP customers.

The second proposed modification affects the setting of the expected load target for tranches for larger non-residential customers. Switching statistics and other relevant information would be used to develop a range of reasonable estimates of the expected load for the CPP-A and BGS-LFP load categories. The highest of these reasonable estimates would be used to set the number of tranches for the CPP-A and BGS-LFP load categories. The number of tranches would be set so that the target for the tranche size is 50 MW, in terms of the PJM peak load contribution for the CPP-A customers, and the actual MISO peak load for the BGS-LFP customers.

Having reviewed the record, the Commission finds that the Staff proposal, subject to the two modifications recommended by the Auction Manager and supported by ComEd and Ameren, should be adopted. This approach will utilize switching analyses to match load with tranche sizes, and maximize the advantages of the simultaneous auction process, while mitigating problems associated with expected load estimation accuracy, unbalanced tranche sizes and timing.

H. Hold Times for Bidder Certifications through the Signing of SFCs

Dr. LaCasse recommended that four bidder certifications be required to “hold” until the signing of the Supplier Forward Contract. ComEd supports that recommendation, stating that for three of the certifications, which relate to a bidder fulfilling its obligations and signing the Supplier Forward Contract after a successful bid, no time period for effectiveness of the certifications is currently specified. Because these three certifications are no longer relevant once the SFC is signed, ComEd claims it is appropriate to make that “hold” period explicit. ComEd says the fourth certification states that the bidder is not associated with any other bidder according to the criteria given in the Auction Rules.

ComEd argues that extending that certification from the Declaration of a Successful Result (as currently provided) until the signing of the SFC makes sense. ComEd asserts that, for example, if it were valid only through the Declaration, the anomalous result would be that bidders who bid independently but become associated shortly before signing the Supplier Forward Contract would be treated differently from bidders who declare an association at the Part 2 Application stage. (ComEd Initial Brief at 76-77) Staff concurs with this recommendation. (Staff Initial Brief at 67)

The Commission has reviewed the Auction Manager’s proposal to extend the fourth certification from the Declaration of a Successful Report to the signing of the SFC. It appears that no party opposes this recommendation. While it seems rather unlikely that the anomalous situation described by ComEd would occur, there is some possibility that it could. Thus, in order to ensure that all bidders are treated equally, the Commission hereby approves the Auction Manager’s proposal to extend the fourth certification to the signing of the SFC.

I. Timeframe for Rerun of Auction

Dr. LaCasse's recommended that Rider CPP and Rider MV specify when the auction would be rerun in the event that the Commission initiates an investigation into the auction results and it is determined that the auction should be rerun, as well as the proposal that prospective suppliers be made aware of the time of any rerun auction. ComEd supports this proposal, claiming it is necessary to define the timeframe during which bidders must continue to abide by their undertakings under the application process.

According to ComEd, bidder undertakings generally remain in place for the duration of the auction process. In the ordinary course of events, the duration of the auction process is well defined through the timeline in Rider CPP and Rider MV. If the Commission initiates an investigation and the auction is rerun with previously qualified and registered bidders participating, there is currently no timeframe defined for the undertakings. To address this situation, Dr. LaCasse proposes that Rider CPP and Rider MV include a timeframe for rerunning the auction and that the auction documents make clear that the pre-auction security could be held until the re-run of the auction is complete. (ComEd Initial Brief at 77)

In its Reply Brief, ComEd says Dynegy does not oppose inclusion of a timeframe for rerunning the auction, but wants adoption delayed until parties have seen and commented on the "entire proposal," which apparently is "an exact proposal with respect to a proposed date for a rerun." ComEd claims that Dynegy's response does not correctly conceive of the proposal. According to ComEd, the proposal at issue here has two aspects – specifying when an auction would be rerun and alerting prospective suppliers accordingly. ComEd says it further contemplates having the auction documents make clear that the pre-auction security would be held until the rerun of the auction is complete. ComEd avers that the proposal does not require specification of a calendar date in order to be clear or complete. (ComEd Reply Brief at 33)

Staff concurs with the proposal, in principle; however, Staff notes that although Dr. LaCasse proposes that Rider CPP and Rider MV specify when the auction would be rerun, she did not actually specify when. Staff recommends that Rider CPP and Rider MV be revised to state that the Auction Manager shall provide a timeline to potential bidders as part of the auction rules, and that this timeline shall include a date or a range of dates within which the auction would be rerun in the eventuality that the Commission initiates an investigation into the auction results and that Staff, the Auction Manager and the utilities determine that the auction should be rerun. Staff says no witness objected to Dr. LaCasse's proposal in principle, and Staff recommends that it be adopted with Staff's proposed modification. (Staff Initial Brief at 67-68)

In its Reply Brief, Staff says Dynegy also complains that the record does not contain a specific timeframe. Staff says Dynegy does not refer to the Staff proposal that Rider CPP and Rider MV be revised to state that the Auction Manager shall provide such a timeline to potential bidders as part of the auction rules. Staff finds Dynegy's alternative -- that the proposal should not be adopted until such time as the parties have been given an opportunity to see the entire proposal and provide their input accordingly -- to be unnecessary given Staff's proposal to include the specific timeframe in the Auction Rules. Staff recommends that the Commission reject Dynegy's proposal to delay resolution of this issue. (Staff Reply Brief at 68)

Dynegy says it does not oppose the concept of including a timeframe for re-running an Auction should that contingency occur. Dynegy states that despite a detailed draft timeline, the record appears to be devoid of the exact proposal with respect to a proposed date for a rerun. Absent this detail, Dynegy says the proposal should not be adopted until such time as the parties have been given an opportunity to see the entire proposal and provide their input accordingly. (Dynegy Initial Brief at 17; Reply Brief at 15-16)

The Commission has reviewed the positions of the parties on this issue. It appears the parties are in agreement with the concept in the Auction Manager's recommendation; however, they do not agree on the specific details of how to implement her recommendation. The Commission believes that both Staff and Dynegy are correct that the Auction Manager's proposal to modify Rider CPP and Rider MV is somewhat vague. Dynegy's proposal to reject the Auction Manager's recommendation at this time, however, is not appealing because it does nothing to address the legitimate underlying concern expressed by the parties.

Staff's recommendation, on the other hand, seems reasonable. Staff proposes that Rider CPP and Rider MV be modified to provide that the Auction Manager shall provide a timeline to potential bidders as part of the auction rules, and that the timeline shall include a date or range of dates within which the auction would be rerun, if necessary. Neither ComEd nor Dynegy objected to this proposal, which was presented in Staff's rebuttal testimony. The Commission believes that Staff's proposal would address Dynegy's concern in that potential bidders would know the date or range of dates when the auction would be rerun, if necessary. The Commission concludes that Staff's recommendation is reasonable and it is hereby adopted.

J. Post-Auction Commission Review of Results

In its Orders in the Procurement Dockets, the Commission adopted, among other things, a five-business day post-auction review period, which commenced on the first business day following the day on which the auction is completed. The Commission directed Staff and the Auction Manager to file their post-auction analyses with the Commission no later than two business days following the day on which the auction is completed.

In the instant proceeding, Staff recommended two alternative changes in the auction schedule to allow Staff one day to review the Auction Manager's Confidential Report to the Commission prior to submitting the Staff's Confidential Report.

Dr. LaCasse supported the second proposed alternative under which the Auction Manager would provide the Confidential Report one business day after the close of the auction. ComEd supports this recommendation, which will provide Staff an additional day to review the Auction Manager's report while still maintaining the overall five-day Commission review period. (ComEd brief at 9-10)

The Commission finds that the second proposed alternative is reasonable and it is hereby approved.

With respect to the Commission's post-auction review, the AG advanced a proposal for the use of benchmarks to either set a reserve price at the start of a procurement process or to assess clearing prices at the end of the procurement process. The AG's proposal is addressed in Section III.A above.

K. Contingency Purchases

ComEd is proposing that Rider CPP be modified in order to clarify the determination of the charges to recover ComEd's supply costs in the event there is no Declaration of a Successful Result for the Fixed Price Section. ComEd says the calculation of these charges is of critical importance to all concerned and ComEd believes that the language should be as clear and easy to understand as possible. The proposed language, ComEd says, is not intended to change the charges or to otherwise affect the rights of any customer.

According to Ameren, the Limitations and Contingencies portion of each of CILCO's, CIPS', and IP's Rider MV describes three scenarios in which CILCO, CIPS, and IP may need to purchase supply outside of the auction process. The contingency purchase plans for each of these scenarios includes purchases from MISO Administered Markets, which is defined in the riders as the markets for capacity and real-time energy, if any, administered by the MISO. This means CILCO, CIPS and IP purchase 100% of the required energy from the MISO real-time energy markets and, given the operations of that market, 100% of the required energy is subject to Revenue Sufficiency Guarantee ("RSG") charges. Since the start of the MISO LMP energy markets, Ameren says on average, the sum of the real-time energy price and the RSG charge has exceeded the day-ahead energy price. The hourly day-ahead prices, real-time prices and RSG charges for the MISO Illinois Hub are contained in Ameren Exhibit 2.2.

Ameren proposes modifying each of the Rider MVs to allow a portion or all of the required energy to be acquired and priced in the MISO day-ahead market, as a cost-reducing measure. This would be accomplished by modifying each of their Rider MVs to allow the utilities to submit a good faith nomination of the expected hourly energy usage to MISO on a day-ahead basis.

Ameren states that RSG charges in MISO are only applied to that portion of the load which does not clear in the day ahead market. Stated another way, RSG is assessed on the difference between the cleared day-ahead demand bid and the actual usage in real time. The difference between the historical day ahead and real time prices is less than the average RSG for the same period, according to Ameren. Ameren asserts that by submitting good faith estimates of the applicable loads as demand bids into the MISO day-ahead market, the associated RSG and thus net total cost to the customer is expected to be reduced.

The Commission has reviewed the record regarding changes proposed by ComEd and Ameren relating to contingency purchases for the fixed price section of the auction. No party objected to the proposed changes and the Commission's review of the proposals indicates that the proposals are reasonable. The Commission, therefore, approves ComEd's and Ameren's proposed changes related to contingency purchases.

L. Uncontested SFC Change Proposals

The first SFC-related issue relates to a variety of changes proposed by ComEd to update and correct the SFC for use in the 2008 auction. All of the proposed changes are of five types: changes needed to make the SFC applicable to the 2008 Illinois Auction as opposed to the 2006 Illinois Auction; changes necessitated by ComEd's proposal to eliminate the hourly auction for ComEd; changes necessitated by changes to market rules, such as new PJM charges; changes that make the SFC more internally consistent and grammatically correct; and changes that provide clarification as to the intent of the SFC on various issues and resolve questions raised by suppliers and other parties during the implementation of the 2006 Illinois Auction. No party contested these proposed changes.

According to Dynegy, currently, the provisions regarding the demarcation of taxes are not similarly worded for utilities as compared to suppliers. Both ComEd and Ameren have proposed language that resolves this issue from Dynegy's perspective. (See ComEd Ex. 2.1 (SFC Section 15.13); AIU Ex. 2.1 (Revised) (SFC Section 15.14)) No party has opposed this change in the SFC language.

The third relates to the deletion of provisions within the SFC (a) regarding the priority of payment of penalties in the event of a RES default (Section 2.1.b(vii)); and (b) requiring that the supplier be registered to do business in Illinois (Section 3.1). In relation to this latter provision, ComEd had also proposed corresponding changes to strengthen the requirement that the supplier maintain a registered agent in Illinois (Section 15.14).

The fourth relates to changes to Sections 2.1.a(i) and 7.4 of the SFC to permit a supplier to supply energy from any PJM e-account it appropriately designated.

The fifth relates to a request from the suppliers that ComEd provide more detailed data on a more frequent basis in the Data Room of the Illinois Auction Website.

ComEd agreed to post estimated annual energy consumption, customer count data categorized by supply group and certain other information to the data room on a weekly basis. However, ComEd believed that the provision of data should be described in informational documents posted to the Web site rather than memorialized in the SFC. ComEd proposed that starting December 1, 2007, data will be provided on a weekly basis and this policy will be posted to the Website. No party contested this proposal.

The sixth relates to a proposal by ComEd to change Schedule C of the SFC making the responsibility for the payment of charges relating to Transmission Owner Scheduling, System Control, and Dispatch Service the responsibility of the utility instead of the supplier. Since ComEd already receives the credits for this service, ComEd says it seems appropriate for ComEd to pay the related charges, as well. No party opposed this proposal.

Dynegy states that currently, the SFC provisions listing the items of damages due upon default are not similarly worded for utilities as compared to suppliers. According to Dynegy, both ComEd and Ameren have proposed language that, though not identical in each case, is acceptable to Dynegy. No party has opposed this change in the SFC language. This proposal is supported by EMMT/Midwest Gen.

Dynegy also says that currently, the SFC provisions regarding assignment of the SFCs impose the applicable creditworthiness requirements on an assignee of a supplier but not on an assignee of a utility. Dynegy states that again, both ComEd and Ameren have proposed language to remedy this discrepancy that is acceptable to it. No party has opposed this change in the SFC language.

The ninth issue relates to a proposal by ComEd to revise the form letter of credit to eliminate unnecessary provisions, correct errors and make clarifications. (See ComEd Ex. 1.0 at 32, lines 648-50; ComEd Ex. 1.1, Appendix E) EMMT/Midwest Gen supports these proposed changes and no other party opposed these proposed changes.

The tenth issue relates to changes to the SFC that were proposed by ComEd and that were necessary to implement changes that PJM had put in place regarding accounting for marginal transmission losses and for its Reliability Pricing Model. No party opposed these changes.

The Commission has reviewed the proposed changes to the SFCs as are summarized above. These 10 changes were advanced by various parties and they are intended to improve the contracts and the auction process. As noted above, no party ultimately objected to any of these 10 proposals. The Commission finds that each of the 10 proposals is reasonable and each is hereby approved.

M. Ameren-Specific SFC Issues

Ameren recommends changes to Appendix C of the SFCs, to specify the specific MISO charges for which the supplier is responsible. In the original Appendix C, MISO charges that were the financial responsibility of Ameren were specified. All other MISO charges, including additional charges in the future, were the responsibility of the supplier. However, several of the items for which the supplier was responsible under the original SFC's Appendix C are items for which the supplier has no practical means of mitigating the cost. A further review also indicated to Ameren that certain of these costs are more closely correlated to transmission service than to supply (for example, charges related to future period network upgrades).

Ameren suggests that by transferring the responsibility for such costs from the supplier to Ameren, and leaving only those costs directly related to their activities as a MISO Market Participant or which are more typically thought of as "generation related" (specifically Schedules 3 – regulation, 5 – spinning reserves, and 6 – non-spinning reserve), it is believed that a more appropriate balance of risk is achieved and a lower overall cost is expected.

Ameren recommends modifying SFC Section 2.1.a to remove the BGS Suppliers option to "self-supply" those Ancillary Services for which the MISO Tariff provides the option for the transmission customer to self-supply. This recommendation was based on the fact that the option was not elected by any of the suppliers in the first auction. Additionally, the expected start of the MISO Ancillary Services Market ("ASM") renders the provision moot. In the ASM proposal, there are no "self-supply" provisions, but rather, these services must be acquired via the ASM and the associated charges will be settled through the MISO Market Settlement process and not through the transmission service settlement process as it is today. These same modifications were proposed for the BGS-FP SFC and the BGS-LFP SFC.

Section 2.1.a of Ameren's SFC is proposed to be modified to remove the supplier's option, upon the applicable certifications, to not identify to Ameren the capacity resources they intend to use to satisfy their resource adequacy requirements under the SFC. Ameren asserts that removal of this provision will enhance the reliability of power supply, because the statutory obligation for providing power and energy to customers rests with Ameren itself. Ameren claims that not allowing CILCO, CIPS, and IP themselves access to the very information that confirms that this obligation is met places CILCO, CIPS, and IP in an untenable situation. Removing this provision, Ameren asserts, will provide CILCO, CIPS and IP with timely access to the information necessary to verify that this obligation and related resource adequacy obligations are met and to allow them to take action to remedy the deficiency if they are not.

Ameren proposes to restructure the SFCs such that in the second Illinois Auction separate SFCs will be executed by each of the three Ameren Illinois Utilities and each of the winning BGS suppliers. Ameren says the reason for this change is to address the suppliers' concern regarding the issue of joint and several liability that was expressed in the regulatory process that took place prior to the initial Illinois Auction and again in the auction improvement workshops. This modification required numerous changes throughout the contract. For example, there are numerous occurrences within the SFC in which the phrase “one or more of the Companies” is replaced by “the Company.”

Ameren’s Exhibit 2.1 is a redline version of the BGS-FP SFC, which highlights these changes against the BGS-FP SFC that was used in the first Illinois Auction. These modifications are being proposed to: 1) modify the SFCs for the next auction, including changing dates to be consistent with the next auction and making language changes to provide further clarification of the responsibilities of the parties to the SFC; and 2) transfer from suppliers certain risks for which they do not have a practical means by which to mitigate that risk. The ultimate goal, Ameren says, is an SFC that strikes an appropriate balance of risk shared by Ameren (and their customers) and the suppliers that will result in the lowest overall cost for customers.

These changes include:

- Modifying Appendix C to limit the MISO charges for which a supplier is responsible to those settled through the Market Settlement Statement and Ancillary Service Schedules 3, 5 and 6;
- Modifying Section 15.14 to provide additional clarity that the line of demarcation for taxes is the delivery point;
- Modifying Section 2.1.b to remove the section that addressed amounts received from a RES as damages, penalties or forfeited security, because this provision is a meaningless carryover from the New Jersey Auction SFC. A RES serving load in one of the Ameren Illinois Utilities’ service territory is not subject to such damages, penalties or forfeited security.
- Modifying Section 3.1(i) replacing the requirement of the supplier to be registered to do business in the State of Illinois with a requirement that the BGS supplier to be registered to do business in all jurisdictions in which registration and authorization is required in order to perform its obligations associated with the SFC.
- Modify Section 15.15 to require the BGS supplier to consent to the jurisdiction of the courts of Illinois for the resolution of any disputes associated with the administration of the SFC.
- Adding definitions for various load switching statistics and added sections 2.1.b.v.(c), (d) and (e), to provide additional data to suppliers regarding the potential and actual load obligations, expected to improve supplier ability to define their expected load obligations, thus reducing the risk related to uncertainty of this obligation and again leading to a lower expected cost.

The Commission has reviewed each of the proposed changes to Ameren’s SFC identified above. The Commission observes that no party objects to any of these proposals. The Commission believes that each is reasonable, and each is hereby approved.

N. Other Timeline Issues

1. Bidder Application Processing Window

In order to increase efficiency and reduce the cost of the qualification process, Dr. LaCasse proposed to introduce a time window during which applications would be processed. Under the proposal, prospective suppliers could submit their applications at any time before or during the application window. If an application were submitted before the application window, it would be processed on the first day of the application window. If an application were submitted during the processing window, it would be processed on the day it was received. (ComEd Initial Brief at 27)

ComEd supports the recommendation, asserting that this change will improve the process and may reduce costs. ComEd claims that announcing a specific date range during which applications are processed would eliminate the need to maintain additional staff at the Auction Manager's Office during the weeks leading up to the application deadlines and potentially reduce the cost of administering the auction. (ComEd Initial Brief at 27)

ComEd argues that the time period necessary to achieve these goals is best evaluated by the Auction Manager, who is most familiar with the process. (ComEd Reply Brief at 22)

Dynegy does not oppose the use of windows for the processing of Part 1 and Part 2 Applications. Dynegy is, however, concerned that the length of the windows proposed by the Auction Manager are too narrow. As proposed, Dynegy says the processing window for Part 1 Applications is open less than 5 business days and less than 6 business days for Part 2 Applications. While Dynegy acknowledges that the application process should go more smoothly the second time around, there may be new potential bidders who will be applying for the first time and, even for companies who applied during the first auction process, issues may still arise. Dynegy suggests this is especially true if new requirements such as Staff's proposal regarding TNW calculations are adopted. To address these possibilities, Dynegy proposes that the processing windows be at least 10 business days. (Dynegy Initial Brief at 8, Reply Brief at 5)

In its Reply Brief, Ameren says it does not disagree with Dynegy's 10-day processing window proposal, set forth in Dynegy's initial brief at page 8. (Ameren Reply Brief at 14)

The Commission has reviewed the record on this issue. As the Commission understands it, for the 2008 Auction, the Auction Manager has proposed introducing a time window during which applications would be processed. Apparently, this proposal is intended to reduce the administrative costs associated with the auction. The Auction Manager's proposal would result in a processing window of less than five business days for the Part 1 application and less than six business days for the Part 2 application.

Dynegy argues that the processing window should be no less than ten business days for each application part. Apparently, Dynegy is concerned that a supplier might encounter unexpected difficulties and be unable to file an application during the processing window.

It appears to the Commission that both sides have valid concerns. Selecting one proposal over the other is problematic, since the proposed time periods at issue appear to be somewhat arbitrary. In recognition of the fact that it is not possible to completely reconcile the two competing proposals, the Commission directs the Auction Manager to adopt a processing window for both the Part 1 and Part 2 application process that is ten calendar days long. This will produce processing windows longer than those proposed by the Auction Manger but shorter than those proposed by Dynegy. The Commission believes this is a fair and reasonable result.

2. Uncontested Timeline Issues

Ameren proposed providing the final Market Cost data and prism at a point closer to the Auction Commencement Date. According to Ameren, the rate prism is used to shape the single winning auction values for the fixed price categories (BGS-FP and BGS-LFP) into seasonal, time of use, and class differentiated prices. The Market Cost data flowing through the rate prism provides the basis for seasonal and time-of-use price differentiation reflected in the Retail Supply Charge Informational Filing provided by CILCO, CIPS, and IP.

Ameren states that the current timeline calls for the final Market Cost data and prism 135 calendar days, or more than four months, prior to the Auction Commencement Date. Ameren recommends that providing final Market Cost data and prism about 75 calendar days prior to the Auction Commencement Date will provide more current pricing and a more current reflection of seasonal pricing to retail customers. Ameren asserts that reducing the number of days before the final Market Cost data and prism are provided would provide a more current reflection of seasonal pricing to retail customers and, also may improve the likelihood of Market Cost being more consistent with what potential suppliers also see as the appropriate seasonal splits.

The Commission has reviewed the proposals of the parties regarding the advancement of the date for providing the final market cost data and prism. It appears to the Commission that the Ameren proposal would improve the auction process, and no party opposed it. As a result, Ameren’s proposal is hereby approved.

Ameren proposed reducing the number of days by which the utility has to submit the Retail Supply Charge Informational Filing from nine to two business days within the Declaration of Successful Result. Ameren is unaware of any issues that would prevent the Retail Supply Charge Informational Filing within two business days of the Declaration of Successful Result. This proposal is supported by ComEd.

The parties have agreed that it would be best if the Public Report were divided into two portions. Under this proposal, the first, containing the bulk of the report including recommendations will be released within 15 business days after Commission review of the results; whereas the second portion will be released within 60 business days.

The parties have agreed to change the order of events in the timeline to ensure better consistency and clarity for potential suppliers. Currently, applications are posted first, then final documents are posted, and then tranches are announced. Under this revised timeline, the tranche targets would be announced first, then the auction rules would be provided in final form (because they rely on the tranche targets), and the Part 1 Application would be released (since the Part 1 Application references the final auction rules).

ComEd supports the recommendation of Dr. LaCasse to change the order of events so that the tranche targets would be announced first, then the Auction Rules would be provided in final form, and finally the Part 1 Application would be released. Dr. LaCasse states that under the timeline currently in Rider CPP and Rider MV, the Part 1 Application is posted first (82 business days before the earliest start date for the auction), then the final Auction Rules are posted (no later than 109 calendar days before the earliest start date for the auction), and finally the tranche targets are announced (no later than 58 business days before the earliest start date for the auction). ComEd asserts that the order of these events can be improved to ensure better consistency and clarity.

The Part 1 Application asks applicants to accept the final Auction Rules and references this document. Logically, the Part 1 Application should be posted after (or at the same time as) the final Auction Rules. The final Auction Rules contain examples and auction parameters that depend on the tranche targets for each product. According to ComEd, logically, this document should be posted after the tranche targets have been announced. Dr. LaCasse proposes that the tranche targets should be announced first, then the Auction Rules should be provided in final form, and finally the Part 1 Application should be posted.

The parties have proposed compressing the timeline between the Part 1 Application and the Auction to provide additional time to integrate the Commission's Order with the controlling documents, to provide bidders sufficient time to consider final documents before having to submit an application, and to reduce the burden on bidders of a lag between the Part 2 Application and the Auction.

The parties recommend that the process of updating the SFCs for the next auction should be clarified. Specifically, they state that it should be clarified that items previously decided by the Commission (e.g., credit, supply group definitions, and contract term structure) require Commission approval to modify. In contrast, the parties state that changes that clarify existing language or implement changes to market rules do not require Commission approval, as long as they comply with Commission orders in the procurement cases and this proceeding.

The parties also want suppliers to have the opportunity to comment on the SFCs. They propose that a compliance filing be made including the final SFCs to demonstrate that they substantively comply with the conditions underlying the Commission's approval of the tariffs and use for retail ratemaking of the auction results as provided in the tariffs. Finally, the parties state that signed SFCs would be submitted to the Commission for informational purposes only.

The Commission has reviewed the proposals of the parties regarding the timeline issues identified above. Except to the extent this order makes conclusions to the contrary, these proposals are reasonable and they are hereby approved.

IV. ENROLLMENT WINDOWS AND SWITCHING RULES

The enrollment window was described as the fixed period of time, after the announcement of the auction based electricity prices, within which customers are permitted to decide whether or not to take the annual fixed price auction product. (IIEC Brief at 7) As explained in of the Procurement Orders, the length of the enrollment period is a matter of judgment; the challenge is to strike the right balance between providing customers with sufficient time in which to make decisions, on the one hand, and on the other, lower the premium that might result if suppliers were forced to hold out fixed price call options for longer periods of time. (Ameren Procurement Order at 213; ComEd Order at 182)

In those Orders, the enrollment window for the 2006 Auction was set at 30 days for customers with demands greater than three megawatts. For Ameren, an enrollment window of 50 days applied to customers with demands between 1 MW and 3 MW. For ComEd, an enrollment window of 50 days applied to customers between 400 kW and 3 MW.

In the instant proceeding, Staff, ComEd, Ameren and IIEC propose to shorten the enrollment windows in order to reduce risk premiums associated with longer windows. Some of these parties also recommend more uniformity in the ComEd and Ameren windows. As discussed below, Staff recommends an enrollment window of 20 days be used for all customers above 400 kW. IIEC concurs, and would go a step further by adding an optional seven-day window. CES and RESA oppose the proposals to shorten the enrollment windows.

Pursuant to the brief outline used in the current proceeding, the parties addressed enrollment and other switching issues individually and in several locations of their briefs. In the interests of administrative ease and in an effort to thoroughly address these related issues, the Commission has attempted to consolidate some of the related arguments. The Commission will similarly consolidate its conclusions on the related issues.

A. Length of Enrollment Windows

1. Staff's Position

Staff recommends an enrollment window of 20 days be used for all customers above 400 kW. Staff states that since there is already an enrollment window for ComEd customers above 400 kW and for Ameren customers above 1 MW, this proposal would simply introduce an enrollment window for Ameren customers between 400 kW and 1 MW. (Staff Initial Brief at 45)

In Staff's view, a 20-day enrollment window for Ameren's 400 kW to 1 MW customers is justified. Staff says an enrollment requirement for 400 kW to 1 MW customers has worked in the ComEd service territory and will work in the Ameren service territory, as well. Under Staff's proposal, these customers would remain in the smaller customer group for purposes of defining auction products and translating auction prices to retail rates. Staff argues that introducing an enrollment period for the 400 kW to 1 MW customers protects not only these customers, but everyone in the smaller customer group, from excessive price premiums associated with potential switching activity. (Staff Initial Brief at 45-46)

In its Initial Brief, Staff suggests that Ameren is opposed to this proposal and that IIEC supports a longer enrollment window. The Commission observes, however, that neither party addressed this issue in its Initial Brief.

As discussed in more detail below, IIEC has proposed what is referred to as a multi-tier enrollment window or a 7/20 enrollment window. Staff indicates that CES expresses general mistrust and opposition to shortening any of the enrollment windows. CES argues, Staff says, that the Commission should be wary of modifying the Illinois Auction in a manner that further restricts customers' ability to choose RES service. Staff agrees with this sentiment, but notes that Staff has been cautious about restricting customers' ability to choose alternative retail suppliers. According to Staff, CES neither contradicts nor questions that this issue involves a balancing of the trade-off between tighter switching rules and lower auction prices versus looser switching rules and higher auction prices. Staff also says CES has not demonstrated that Staff's proposed rebalancing of competing goals, favoring tighter switching rules and lower auction prices, is unwarranted. (Staff Initial Brief at 47-48)

Notwithstanding the opposition expressed by CES, Staff recommends that the Commission approve the use of the Ameren/ComEd-modified version of IIEC's multi-option approach toward enrollment windows. However, if that proposal is rejected, then Staff urges the Commission to approve the use of 20-day enrollment windows for these larger customers. Staff believes that the risk premiums associated with the large customer products can be mitigated, at least to some extent, by reducing the enrollment window. (Staff Initial Brief at 48)

In its Reply Brief, Staff responds to statements by RESA that the prices for those auction products utilized for large non-residential customers were significantly higher than the prices for those products utilized for residential and smaller non-residential customers. Staff says RESA correctly recognizes that the differential is due to a greater degree of risk to wholesale supplier that large customers will switch to RES service. Staff claims RESA then leaps to the unsubstantiated conclusion that such risk exists regardless of the enrollment windows given to each group. Staff argues, however, that record evidence and common sense indicates that the risk is proportional to how far forward market prices can wander between the point that the supplier commits to supplying the service and the point that customers must commit to taking that service. Staff asserts that the degree to which those forward market prices can wander are a function of their volatility and the length of time over which that volatility is allowed to manifest itself. (Staff Reply Brief at 30)

According to Staff, there is nothing that the Commission can do to reduce market volatility. Staff asserts, however, that by modifying the enrollment window, the Commission can control the length of time over which that volatility is allowed to manifest itself. (Staff Reply Brief at 30)

In its Reply Brief, Staff disputes CES' argument that a shorter enrollment period will not reduce the auction price. Staff says CES mischaracterizes a NERA's Supplier Survey as saying "potential bidders state that shorter enrollment windows alone would not affect their bids." (Staff Reply Brief at 30-31, citing CES Initial Brief at 13-14) According to Staff, the survey only asked about how a shortened enrollment window would affect suppliers' ranking of the risk associated with bidding on the large customer group relative to the small customer group. (Id., citing Tr. 716-724) Staff asserts that the survey did not ask how a shortened enrollment window would affect bids, the amount of premium that a bidder would need to commit to serving the large customer group, or the final resulting auction prices. Staff notes one supplier volunteered that "Shortening the enrollment window would certainly reduce the risk," while another supplier stated, "…the cost of the option would be based on the number of days between the auction certification and the known decision date." (Staff Reply Brief at 31, citing AM Ex. 1.8 at B-16)

According to Staff, CES also argues that a 20 day enrollment window is too short as a matter of practicality. Staff disputes CES' suggestion that Staff believes 45 days was sufficient and that 20 days is insufficient. Additionally, notwithstanding CES' concerns, Staff says witnesses for ComEd and Ameren did not indicate that they would have problems managing the administrative process with only a 20 day window. (Staff Reply Brief at 31-32)

2. ComEd's Position

According to ComEd, one question in this proceeding relates to whether or not to shorten the enrollment window used in the 2006 auction; and a second relates to whether or not to use a pre-commitment, or as it evolved in rebuttal testimony, a pre-qualification process. (ComEd Initial Brief at 46)

ComEd supports the enrollment window position that Staff presented in its direct testimony. Staff had proposed to shorten the enrollment period for larger nonresidential customers to 20 days. Staff's proposal strikes an appropriate balance between the goals of reducing the risk suppliers face and reflect in their fixed-price bids, and providing enough time for customers to consider their service alternatives. (ComEd Initial Brief at 47)

ComEd believes that Staff's proposal to shorten the enrollment window could significantly reduce suppliers' CPP-A bids. ComEd says that while it is extremely difficult, if not impossible, to precisely quantify the relationship between the length of the enrollment window and the likely impact on the future auction prices, shortening the enrollment window to 20 days could reduce the CPP-A product price in future auctions by about $6 per megawatt-hour, holding everything else equal. Electricity price volatility, ComEd asserts, is a key driver of the amount of customer migration risk assumed by suppliers, and this volatility is greater over longer periods of time. According to ComEd, a study of actual electricity price volatility witnessed in the market is helpful in understanding risk under varying enrollment windows and the effect that this risk may have on suppliers' bids. (ComEd Initial Brief at 47-48)

ComEd disputes CES' argument that its analysis was not predicated on any legitimate basis because the data were not available to perform a comprehensive quantitative analysis. According to ComEd, simply because an analysis is not comprehensive does not mean the analysis that was performed is not valid. ComEd maintains that its analysis was a fundamentally sound quantitative analysis illustrating that shortening the enrollment window could result in significantly lower switching risk premiums. (ComEd Initial Brief at 48)

ComEd disputes CES' claim that ComEd's analysis neglected to acknowledge that customers do not know the price of the default service until ComEd files its supply charge tariffs with the Commission. ComEd argues that contrary to CES's claim, whether or not customers know the exact price for default service until ComEd files its supply charge tariffs with the Commission, suppliers are still just as exposed to market price movements during the period between the time the auction closed and the time in which ComEd filed its supply charge tariffs; this exposure exists because electricity market prices move during this period whether or not ComEd's CPP-A customers must wait until ComEd's default service tariffs are filed before they know the exact value of the default service rate that is being offered. Once the tariffs are filed, ComEd says customers have the entire enrollment window to compare competitive market offers with the default service rates. ComEd also states that customers can do a significant amount of investigation and planning to prepare for their final choices regarding electricity supply before they know the exact value of the default service rate offered. (ComEd Initial Brief at 48-49)

ComEd also disputes CES' argument that ComEd incorrectly calculated the number of days for ComEd's supply charge filing in his analysis. ComEd claims the time lengths that it analyzed correspond to the time periods over which suppliers have been required or might be required to hold open their fixed-price CPP-A offer while customers observe market price movements and make their service decisions. The CPP-A enrollment window in the 2006 Illinois Auction was 50 calendar days. ComEd says that suppliers were exposed to switching risk over a longer period of time. Before the enrollment window began, the Commission was provided five business days to approve the auction results, and then ComEd was provided nine business days to make its supply charge tariff filing.

ComEd asserts that in the 2006 Auction, the suppliers were effectively exposed to market price movements for approximately 70 calendar days, not 50 calendar days (using a calendar day to business day ratio of 7/5). ComEd contends that if the enrollment window is shortened to 45 calendar days for the next auction as is currently planned, suppliers will face switching risks over 65 calendar days. ComEd proposes to shorten the retail supply charge informational filing period from nine business days to two business days and the enrollment window to 20 calendar days. ComEd says that implementing both would result in supplier exposure over only 30 calendar days. According to ComEd, 70, 65 and 30 days are the appropriate windows to consider. (ComEd Initial Brief at 49-50)

CES claims ComEd attributed 100% of the price differential to the length of the enrollment window, whereas CES maintains that something less than 100% of the price differential may be attributable to the enrollment window, given that suppliers believe the annual products are riskier than the blended products. According to ComEd, whether 100% or a somewhat lower percentage of the price differential relates to the enrollment window, ComEd's quantification illustrates that shortening the window offers the potential for significant savings for customers. (ComEd Initial Brief at 50)

ComEd claims CES made no attempt to quantify the effect that the length of the enrollment window has on the premium charged by the suppliers, and adds that CES has done no analysis that would quantify the extent to which, if any, the shortened enrollment window would have on the overall auction predicated prices. Instead, ComEd says CES points to a Supplier Survey the Auction Manager had performed, stating that the survey shows potential bidders believe shorter enrollment windows would not affect their bids. ComEd asserts that on cross examination, CES witnesses admitted that this conclusion would be a misinterpretation of the Supplier Survey because based on this survey, the only thing one can assess is the relative riskiness of the annual and blended products, not whether bids would be affected by a shorter enrollment window. (ComEd Initial Brief at 50-51)

According to ComEd, in response to the survey, the majority of suppliers said that a shortened enrollment window would not affect their rankings on the basis of relative risk. These suppliers, ComEd claims, did not say that a shortened enrollment window would not affect their bids. ComEd asserts that the survey shows that the suppliers said just the opposite. (ComEd Initial Brief at 51)

ComEd believes that the shortened enrollment window as proposed by Staff also provides ample time for CPP-A eligible customers to make their supply decisions. By the time the second auction is completed and the enrollment window opens, ComEd says customers will have had over one year to become familiar with their post-2006 choices and competitive options. ComEd agrees with CES that there has been substantial market development in Illinois as evidenced by the switching statistics and the number of RES that are participating in the Illinois retail market. In ComEd's territory, over 75% of the non-residential load is now being served by an alternative retail supplier. ComEd says the retail market pertaining to the second auction presents a different situation than the first auction in that customers now have greater awareness and experience regarding the changing tariffs for electricity supply, the supply choices available to them, and the need to make those choices within a pre-defined time frame. (ComEd Initial Brief at 51-52)

According to ComEd, CES suggests that customers should be allowed to take advantage of timing the market, rather than being limited to a utility or regulatory schedule as largely had been the experience during the transition period. ComEd does not believe that a shorter enrollment window unduly limits the ability of large customers who wish to take advantage of timing the market, to do so. ComEd argues that customers who are sophisticated enough to watch market prices on a regular basis, and time buying decisions around market price movements will still have the ability to do so.

ComEd contends that a shorter window simply reduces the time period that those sophisticated customers, or RES acting as agents on behalf of the customers, will be provided to take advantage of arbitrage opportunities presented by differences between the fixed auction price and the moving market price, at the auction suppliers' expense. ComEd asserts that it is this type of customer sophistication and switching behavior that drives the need for suppliers to include significant risk premiums in their fixed price, as evidenced in the 2006 auction. It also has the effect of making the auction product far less attractive to potential suppliers who are interested in more certainty in their future sales volumes, ComEd claims. (ComEd Initial Brief at 52)

Although CES and RESA contend there is no showing that a shorter enrollment period will yield material benefits, ComEd asserts that the record is clear that the risk premiums associated with the large customer products can be mitigated, at least to some extent, by reducing the enrollment window. According to ComEd, the quantitative analysis presented in the direct testimony of Mr. McNeil is the best evidence available to the Commission on this question, and it demonstrates that shortening the enrollment window to 20 calendar days could reduce the CPP-A product price in future auctions by about $6/MWh, holding everything else equal. (ComEd Reply Brief at 25)

ComEd argues that the relationship between shorter enrollment periods and lower prices is so compelling that IIEC has proposed that an optional 7-day enrollment window be made available to larger customers to enable them to avoid unnecessary risk premiums and achieve potentially lower cost auction results. Although ComEd raised concerns about customer confusion that might result from this proposal, it suggested modifications that could be adopted to address those concerns in the event that the Commission decided to approve this approach. ComEd notes that Staff now recommends that the Commission approve the multi-option, 7-day and 20-day enrollment window alternative, with the modifications suggested by ComEd. ComEd says if the Commission follows Staff's recommendation, ComEd is prepared to implement it. (ComEd Reply Brief at 25-26)

3. Ameren's Position

Ameren proposed a reduced enrollment window for BGS-LFP customers. Ameren claims that shortening the enrollment window would lower the cost of power for customers taking the BGS-LFP service. Ameren says BGS-LFP suppliers face an uncertain load obligation until such time as the enrollment window closes. After the enrollment window closes, Ameren states that suppliers must serve the resulting load obligation at the price determined in the auction. In Ameren's view, the closer that these two events occur (the end of the auction and the end of the enrollment window), the less risk these suppliers face. Conversely, the further apart these two events occur, the more risk these suppliers face.

According to Ameren, this risk exists regardless of whether the supplier commits supply resources for its maximum potential obligation and then disposes of any excess once the obligation is known, or waits until the obligation is known and then commits the needed supply resources. (Ameren Initial Brief at 43)

Ameren contends that this uncertain load obligation and the risk that the price of electricity may change during this period, to the detriment of the supplier, is reasonably expected to be factored into a supplier's willingness to serve this load at a given price. Ameren argues that the greater the risk, the greater the premium one would expect a supplier to include in its calculations.

According to Ameren, the significant difference between the final auction price for BGS-FP Supply and BGS-LFP Supply gives a strong indication that suppliers applied such a risk premium in determining their bids. Given that (1) there is no switching uncertainty after the window closes (as opposed to the BGS-FP where such switching could continue throughout the term of the contract), (2) the load shape of the BGS-LFP eligible load has had a higher load factor in every month since June 2003 and (3) the SFC for BGS-LFP was virtually identical to that of BGS-FP, Ameren argues this seemingly leaves the great uncertainty regarding the ultimate load obligation and the price volatility risk during the window as the driving force for the price disparity. (Ameren Initial Brief at 43-44)

Customers in the BGS-FP class are not locked in, but rather can switch throughout the contract term; thus, Ameren says one might expect an even larger premium associated with the BGS-FP Supply than with the BGS-LFP Supply, if the customers in that class were known to have the same propensity to switch as BGS-LFP customers. Ameren says this is not the case. Experience, Ameren claims, indicates a much higher propensity to switch by BGS-LFP customers. The existence of the enrollment window itself, Ameren asserts, was an acknowledgement of the BGS-LFP group's propensity to switch. (Ameren Initial Brief at 44)

The length of the window was the subject of considerable debate in Dockets 05-0160/0161/0162 Cons. – one which attempted to balance providing customers with sufficient time to analyze competing offers and the price premium associated with the load uncertainty created by the enrollment window. Ameren argues that the length of the enrollment window for BGS-LFP suppliers did contribute to a substantial price premium for the BGS-LFP product in the Illinois auction, and that this created substantial headroom for ARES. Ameren asserts that in the face of BGS-LFP prices which included this premium only 28 out of the 540 customers (5.2%) eligible to take BGS-LFP Service did so (the 28 customers represent only 50 of 1853 MW's of peak demand (2.7%)).

Customer switching activity, Ameren says, has been extremely robust since the close of the enrollment window. According to Ameren, while switching is not undesirable in and of itself, the goal should be to provide economical choices to customers, not to turn the utilities' fixed price rate offering into a non-economical alternative for customers, in effect forcing them off of the service. (Ameren Initial Brief at 44-45)

Ameren suggests that another step that can be taken to reduce uncertainty for BGS-LFP suppliers is for Ameren to provide BGS-LFP Suppliers with frequent updates of customer activity during the enrollment period. Ameren says postings on enrollment statistics would be provided to supplier. According to Ameren, providing updates on this data during the enrollment period could provide suppliers with indications of enrollment behavior. Ameren proposes to provide updates throughout the enrollment period no later than the close of business of each Monday, for responses received during the prior week. (Ameren Initial Brief at 45)

Ameren says another factor to consider in the second auction regarding the enrollment period is that, in first auction, most BGS-LFP eligible load was already on utility supply (including PPO) and had to opt-out of the BGS-LFP group. In this coming auction, Ameren asserts the opposite is the case – the vast majority of BGS-LFP eligible load is being served by ARES, and as such, must opt-in. In Ameren's view, this issue is significant because, in the first auction, the large majority of BGS-LFP-eligible customers all had to make an enrollment decision at the same time, and if they enrolled or took no action they lost access to all other supply alternatives for a full year.

Ameren suggests that with the tables turned, the availability of BGS-LFP at a point in time is just one of the options available to them. If they fail to act during that window, Ameren says they still have multiple alternatives available to them. Ameren also suggests they may have no need to act during this time, as they may have entered into longer term agreements with alternate suppliers, and thus would not view BGS-LFP as an available option anyway. Ameren also says that given the high level of switching that has already occurred, it is reasonable to assume that much of the marketing groundwork has already been laid. Ameren states that customer contact has been made, relationships developed and customers have experience under their belt. Ameren asserts that this should facilitate the process when the next BGS-LFP enrollment is available. (Ameren Initial Brief at 45-46)

In Ameren's view, 20 days strikes the appropriate balance between providing customers with sufficient time to compare the outcome of the auction and the desire to limit the price premium associated with the length of time between the end of bidding and the close of the enrollment window. Ameren says a significant portion of customers have already demonstrated the ability to take action within this time period. According to Ameren, it is reasonable to believe that whether the period is 20, 30 or 50 days there is a significant group of respondents that will wait until the last day to provide such a notice to eliminate a supply option. (Ameren Initial Brief at 46-47)

Ameren states that reducing the window to 20 days, when combined with the reduction in the amount of time provided to make the Retail Charge Informational Charge filing will significantly reduce the lag between the close of the auction – the point at which the suppliers potential obligation is truly created – and the end of the enrollment window – the point at which the obligation is known with reasonable certainty. Ameren says its proposal would reduce the time lag between the close of bidding and the end of the auction by more than 50%. (Ameren Initial Brief at 47)

According to Ameren, CES suggests that Staff's enrollment window recommendations would unnecessarily limit customer's flexibility and freedom to choose competitive service. Ameren says CES' assertion suggests that in the absence of a lengthy enrollment window customers will be more captive to utility supply, but, Ameren believes otherwise. Ameren says customers have demonstrated their ability to make decisions in a time frame much shorter than the existing enrollment window and that certain customers could comply with an enrollment window as short as five days. (Ameren Initial Brief at 48)

Ameren says a significant portion of customers made their enrollment elections within 20 days and a significant number of notices were received in the final three days of the window. According to Ameren, some decision-makers will leave this seemingly "free option" open as long as possible, regardless of the length of the window. Ameren also suggests the uncertainty related to actions in the Illinois General Assembly may have caused some customers to delay making any decision until absolutely required to do so. Ameren also says BGS-LFP customers clearly were not captive to this rate as evidenced by the fact that only 5% of eligible customers enrolled. (Ameren Initial Brief at 48)

According to Ameren, CES claims no one has clearly articulated the problem associated with giving customers added flexibility to choose that is provided under the current Illinois Auction Structure. Ameren believe that the problem is obvious – the resulting auction price of about $85/MWh for BGS-LFP supply, as compared to a price in the $65-range for smaller customer supply. Ameren says the vast majority of potential BGS-LFP customers did not consider $85/MWh to be an economic alternative, with 95% of them clarifying the problem by not choosing the BGS-LFP alternative. (Ameren Initial Brief at 49)

Ameren asserts that under current circumstances, the dynamic is changed from one in which a vast majority of the eligible group must make a decision in a certain time frame or be locked out of all other options to one in which 95% of eligible customers must now make a positive election (opt-in) to receive the service.

In Ameren's view, this is significant because there may be customers who have already entered into supply contracts with RES, and thus do not need to make a decision within the enrollment period, reducing the potential marketing contacts for RESs. Ameren also says that a customer who fails to opt-in is not shut out of all of the other market offerings available to that customer, such as the utility's own hourly-priced product or competitive RES products and services; the fixed-price utility offering is simply one choice. Ameren maintains that the consequences of failing to act within the enrollment window are not as limiting as they were in the first auction. (Ameren Initial Brief at 49-50; Reply Brief at 15-16)

Ameren argues that while customers and suppliers do not benefit from longer enrollment windows, RES do. Ameren claims this is because BGS-LFP supply in effect provides a price to beat alternative to RES supply. The higher the price, Ameren asserts, the easier it is to beat. According to Ameren, it is in the RES' best interest to have long enrollment windows and the associated high embedded risk premiums. (Ameren Initial Brief at 50)

In Ameren's view, there is simply no support for RESA's claim that contract length is the reason behind the non-competitive BGS-LFP auction price. Ameren argues that the price differential between the BGS-LFP and the smaller customer fixed price product tells an entirely different story. (Ameren Reply Brief at 16-17)

4. IIEC's Position

IIEC states that the enrollment window is the fixed period of time, after the announcement of the auction based electricity prices, within which customers are permitted to elect to take the annual fixed price auction product. The purpose of the enrollment window, IIEC says, was to limit the cost exposure of successful auction bidders associated with holding a bid price open to customers that might migrate to third party supply. (IIEC Initial Brief at 7)

In the September 2006 Auction, the enrollment window for customers with demands of less than 3 MW was 50 days. It is scheduled to become 45 days in the next auction. For eligible customers with demands in excess of 3 MW, the current enrollment window is 30 days. Staff has recommended the enrollment window for larger non-residential customers (400 MW or greater) be reduced to 20 days for the next auction. ComEd and Ameren have recommended a 20-day enrollment window for the next auction. (IIEC Initial Brief at 7)

Pre-commitment, according to IIEC, refers to a pre-qualification procedure that would require customers to commit to taking the annual fixed price auction product before the auction is conducted and the product's price is determined. Staff's Auction Report suggested such an approach as a possible means of reducing the risk premiums built into the bid price for that auction product; however, Staff did not recommend such an approach in this case. (IIEC Initial Brief at 7)

In IIEC's view, no customer should be required to pre-commit to the Fixed Price Auction product prior to knowing the price for the product. IIEC asserts that most large customers cannot pre-commit to an unknown price. In addition, IIEC says such customers would not consider it sound business practice to pre-commit, because they would be required to forego alternative supply options that might develop between the time of the pre-commitment and the time they actually take the Fixed Price product from the utilities. (IIEC Initial Brief at 8)

IIEC notes that no other party appears to support a requirement that customers "pre-commit" to the Fixed Price Auction product prior to knowing the price for that product. IIEC says Staff, based on the concerns expressed by the parties, has apparently abandoned any thought that customers should be required to pre-commit. IIEC, in its direct testimony, did suggest that it would not object if the pre-commitment approach were made strictly optional. However, because other parties see little or no value to the pre-commitment approach, even on an optional basis, IIEC does not currently propose that such an approach be implemented – even on an optional basis. (IIEC Initial Brief at 8)

IIEC has no objection to recommendations that the enrollment window for larger customers be reduced to 20 days. IIEC recommends that larger customers using the annual fixed price product (400 kW and over on the ComEd system and 1 MW and over on the Ameren system), be given the option to select a 7-day enrollment window for choosing the annual fixed price product. (IIEC Initial Brief at 8-9)

IIEC asserts that some larger customers would and could manage a shortened enrollment window in order to access lower power prices that might be associated with such an option. IIEC believes a period as short as five business days could be manageable for larger customers. IIEC says customers who elect this option would need to have preparations made and arrangements for supply options they are considering finalized or nearly finalized to accommodate the shorter enrollment window. (IIEC Initial Brief at 9)

IIEC's claims its approach gives larger customers the flexibility to select an enrollment period that better reflects their administrative needs. IIEC believes its approach has the potential to help larger customers avoid unnecessary risk premiums, related to customers who require prices to be held open for an extended period. A single 20-day enrollment window would be an improvement over the September Auction's lengthier enrollment windows; however, IIEC asserts that it does not fully address the needs of larger customers who are able to accept, at their option, shorter enrollment windows in exchange for potentially lower cost auction results. (IIEC Initial Brief at 9)

According to IIEC, ComEd estimated that the value of the difference in risk between a 70-day enrollment window and a 20-day enrollment window is approximately $6 per MWh. Based on these estimates, IIEC says it is reasonable to infer that an even shorter enrollment window would yield even lower prices, due to the reduced risk on suppliers. (IIEC Initial Brief at 9-10)

IIEC says that suppliers face uncertainty as to the load they must serve until the large customer enrollment window closes. Once the enrollment window closes, these suppliers will know their load obligation. According to IIEC, the shorter the time between the close of the auction and the end of the enrollment period, the less risk suppliers will face. The further apart in time the two events are, the greater the risk faced by suppliers. IIEC suggests that the shorter period for large customers could be either five business days or seven calendar days and the practical effect for customers is the same for either definition. IIEC recommends that the Commission grant larger customers an option to select a seven calendar day enrollment window, with a longer 20-day enrollment window as the default for customers that do not make that selection. (IIEC Initial Brief at 10)

In its Reply Brier, IIEC says Staff has recommended adoption of the IIEC recommendation, as modified by the utilities. (IIEC Reply Brief at 6-7, citing Staff Initial Brief at 48) IIEC has no objection to adoption of its proposal as modified.

IIEC says that CES asserts that (i) the record evidence does not support a reduction in the enrollment window; (ii) the shorter enrollment window cannot be implemented in a timely fashion, and (iii) the shorter enrollment window limits customer freedom. IIEC avers that CES is incorrect on all counts. (IIEC Reply Brief at 8)

According to IIEC, the evidence shows that the auction prices for larger customers (CPP-A and BGS-LFP) were substantially higher than the auction prices for the small to medium customers (CPP-B and BGS-FP). IIEC asserts that these higher auction prices were not a function of any fundamental difference in the expected cost of power needed to supply large customers in comparison to the expected cost of power needed to supply small to medium customers. Rather, IIEC claims the differences in price reflected differences in the perceived risk of the load to be served. (IIEC Reply Brief at 8)

The record, IIEC argues, shows that larger customers are more prone to switch from utility service to third party supply. IIEC asserts that retail suppliers must be prepared to serve the Illinois eligible load of the large non-residential customers, whether 100% or 1% of that load ultimately takes supply service from the utility. Finally, IIEC contends that suppliers must hold their prices open over the entire period of the enrollment window. According to IIEC, suppliers winning tranches in the auction would anticipate losing load if market prices went down during the enrollment period and gaining load if market prices went up during the enrollment window. IIEC suggests that these considerations were reflected in the bid prices for large customer auction products. (IIEC Reply Brief at 8-9)

Citing testimony from Ameren, IIEC asserts that suppliers in the auction face uncertain load obligations until the enrollment window closes. IIEC also claims that a shorter period between the end of the auction and the close of the enrollment window reduces the risk those suppliers face. IIEC contends that the greater the risk faced by suppliers, the larger the premium included in the auction bid price. (IIEC Reply Brief at 9)

Again citing evidence presented by Ameren, IIEC asserts that the load shape of the larger customer load (BG-LFP) was better than the load shape for medium and smaller customer load (BGS-FP), and that the supplier forward contracts (SFC) were the same for both all auction segments. IIEC suggests that the primary reason for the significant difference in the auction prices for the larger customers and the small to medium customers was the load uncertainty associated with the large customer load, not cost of service differences. IIEC claims that reducing this uncertainty by adopting a shorter enrollment window should lead to a reduction in the auction prices for larger customers. (IIEC Reply Brief at 9)

IIEC says that ComEd presented a quantitative analysis of the effect of the enrollment period's length on auction prices. According to IIEC, this analysis demonstrated that shortening the enrollment window could reduce suppliers' bids for the large customer loads (CPP-A). IIEC also asserts that price volatility has a major impact on the risk assumed by suppliers, and that volatility is greater over longer periods of time. Shortening the enrollment window, IIEC claims, reduces the period of price volatility and the risk suppliers face. According to IIEC, these reductions, in turn, lower the risk premiums built into bids and thus reduce bid prices. (IIEC Reply Brief at 10)

According to IIEC, even CES' witnesses presented only their interpretation of the Supplier Survey performed by the Auction Manager to support their contention that shorter enrollment windows would not affect supplier bids. IIEC asserts, however, that the Survey merely assessed the relative riskiness of the annual fixed priced product and the blended product offered to residential and small commercial customers – not how a supplier perceives the risk of a particular product. IIEC argues that the Survey did not address or provide any insight on whether the length of the enrollment window affects the bid price for the annual fixed price product offered to larger customers. (IIEC Reply Brief at 10)

IIEC argues that the length of the period of uncertainty faced by bidders does affect risk, and prices and CES' suggestion that it does not is simply incorrect. IIEC contends that there is ample support in the record for the conclusion that shortening the enrollment window would have a favorable impact on the auction price of the fixed price product for large customers. (IIEC Reply Brief at 10-11)

IIEC disputes CES' argument that the proposal to give customers an option to choose a twenty-day or a seven-day enrollment window cannot be implemented in a timely fashion. IIEC claims that CES' argument ignores the fact that many of the steps it identifies can be accomplished before the auction is even conducted. (IIEC Reply Brief at 11-12)

IIEC says those parties responsible for implementing the proposal, while acknowledging certain challenges, indicated in their testimony that the proposal can be implemented. IIEC witness Stephens indicated that a window of as few as five business days was workable from the customer point of view. IIEC also suggests that customers would not necessarily be confused by being given the option. IIEC says the Staff witnesses testified that they believe customers are better off being given the choice of enrollment windows, even if not all of them have time to do it. (IIEC Reply Brief at 12)

According to IIEC, CES ignores the fact that customers have already had substantial experience in acquiring power in the market and are now more familiar with the process. IIEC says an unsupported assumption that they still require as much as 45 days to make a decision is no longer valid. IIEC believes it is unlikely that customers incapable of making quicker decisions will choose the seven-day enrollment period. For customers not comfortable with the shorter window, IIEC asserts the twenty-day enrollment period is an adequate alternative. (IIEC Reply Brief at 13)

IIEC also disputes CES' argument that a shorter enrollment window would somehow limit customer options. IIEC argues that the enrollment window options give customers an additional choice in how they participate in the market. IIEC further asserts that CES ignores the fact that customers failing to select an alternative supplier or utility fixed cost supply will default to the hourly product, where they retain the right to leave utility service at any time. (IIEC Reply Brief at 14)

RESA also suggests there is insufficient evidence to support the proposition that reducing the enrollment windows will result in lower prices for power. IIEC says RESA did not present any testimony or evidence to contradict the conclusion of Staff, Ameren, ComEd, and IIEC that shortening the enrollment window will likely have a beneficial effect on the auction price of the default product for larger customers. (IIEC Reply Brief at 14-15)

RESA also suggests that shortening the enrollment window will make it more difficult for customers to switch to third party supply. IIEC argues that the enrollment window itself does not affect the ability of the customers to switch to third party supply, even after the enrollment window has expired. IIEC maintains that customers who do not choose third party supply or the utility fixed price product will default to the hourly product and have the ability to leave that service at any time. IIEC asserts that if modifications to customers' rights to leave the ComEd fixed priced offering are adopted, it would be those modifications, not the length of the enrollment window that may affect customers' ability to select third party supply. (IIEC Reply Brief at 15)

IIEC also responds to RESA's argument that the driving force behind these auction prices is the supply risk associated with committing to supply power over longer periods of time, not time based risk. According to IIEC, this argument overlooks certain fundamental, undisputed facts. IIEC says the auction product price of concern here is for the fixed price annual product, which is based on one-year contracts. IIEC also says the auction price for the annual fixed price product was significantly above the price associated with the blended auction product, which is based on one, two and three year contracts. Therefore, IIEC argues that it is difficult to accept the validity of the RESA argument that the increased supply costs for the annual product were driven, not by time based risk, but by the risk associated with committing supply and power over periods of two or three years. (IIEC Reply Brief at 15-16)

5. CES' Position

CES states that Staff, ComEd, Ameren, and IIEC seek to cut by more than 50% the amount of time that customers have to make supply decisions after the resulting retail electric rates are filed with the Commission. If the Commission adopts these proposals, CES says customers would have less than half the number of days that the Commission deemed appropriate for such decisions and less than a third of the amount of time the Commission approved for PPO enrollment during the transition period.

According to CES, these parties support shortening the window to, at most, 20 days but do not demonstrate how a shortened enrollment window will yield material benefits. CES asserts that ComEd and Ameren could not state how much, if any, premium was included in the suppliers' bids in the 2006 Auction due to the length of the enrollment window. CES further argues that no party presents a customer survey to ascertain customers' perceptions and valuations of the 45-day window. In CES' view, these parties' respective proposals are particularly surprising given their positions regarding the enrollment window at the conclusion of the Procurement Dockets; their general agreement that the 2006 Auction was a success; and the evidence from potential bidders indicating that shortening the enrollment window would not make their bids for the annual products lower. (CES Initial Brief at 9-10)

CES says that while it understands the parties' desires to reduce the bid prices for the annual product, the evidence in the record fails to demonstrate how the proposed modifications would achieve that goal. CES claims a 20-day enrollment window is inappropriate and unnecessary. CES claims its members have negotiated thousands of competitive retail energy contracts with business customers. Based upon this experience, CES asserts that retail customers simply require more than 20 days to analyze their supply options. Such real-world experience, CES avers, should guide the Commission in its evaluation of, and rejection of, the shortened enrollment window proposals. (CES Initial Brief at 10-11)

For the most part, CES says business customers consider buying electricity to be an occasional, rare activity and, accordingly, do not have experienced personnel dedicated to the task. The 2008 Auction, CES claims, may be the first time many customers have ever attempted to negotiate a contract with a RES and that these customers may need more than 20 days to complete the requisite tasks inherent in the supply decision-making process. CES states that 82% of the customers eligible for Ameren’s annual products took more than 20 days to make their decision following the 2006 Illinois Auction. CES also says that a majority of ComEd’s customers eligible for the Annual Product took more than 20 days to elect supply options. Retention of the 45-day enrollment, CES says, would provide sufficient time for customers to complete the myriad tasks inherent in the supply contracting process. (CES Initial Brief at 11)

The proposals to shorten enrollment windows, CES argues, could produce the unintended consequence of having large customers take utility supply due to administrative or bureaucratic fiat and not based on the supply arrangement that best meets their needs, while doing little to reduce the price of the annual products derived from the Illinois Auction. According to CES, a 20-day enrollment window effectively will preclude certain customers, such as governmental entities, park and school districts, universities, and hospitals, from accessing the competitive market, thereby barring them from obtaining customized supply options to best meet their energy needs. (CES Initial Brief at 12)

No party, CES claims, has proven that a 20-day window will produce less-expensive utility products. Instead, CES says all that is assured is that if the Commission accepts those proposals customers will have less time in which to make a decision – a result that, in CES' view, does not comport with meaningful customer choice or robust customer protection. (CES Initial Brief at 12; Reply Brief at 11)

CES says no wholesale supplier has testified that it would significantly alter its bids as a result of a shorter enrollment window. CES claims that that wholesale suppliers most likely will include additional premiums into their bids in order to account for expectations of serving the additional load of customers forced to remain on the utilities’ service. CES further claims that shorter enrollment windows alone would not affect suppliers’ bids. If the Commission’s purpose in the instant proceeding is to minimize risk premiums, CES suggests the Commission should maintain as many of the components of the 2006 Auction as possible. (CES Initial Brief at 12-13; Reply Brief at 11)

The Commission, CES says, should not rely on ComEd's analysis that shortening the enrollment window, from 45 days to 20 days, might reduce wholesale suppliers' bid price by $0.06/kWh. CES claims ComEd cannot attest, with any level of certainty, how wholesale suppliers may factor the shortened window into their next bids because data are not available to perform a comprehensive quantitative analysis. CES asserts that ComEd's inputs were incorrect, improper, and significantly overstated the alleged risk premiums. According to CES, NERA's Supplier Survey also successfully exposes the theoretical nature of ComEd's proposition by indicating that shorter enrollment windows alone would not affect suppliers' bids. (CES Initial Brief at 13-14; Reply Brief at 11-12)

CES claims that ComEd attributes 100% of the price differential to wholesale suppliers' perceptions of switching risk – despite the NERA Supplier Survey's findings that shorter enrollment windows would not affect potential bidders' bids. CES asserts that ComEd's analysis ignores the fact that wholesale suppliers' bids are comprised of numerous inputs, many of which fluctuate from one product to the next, as well as from one auction to the next.

CES says no party endeavors to isolate the alleged risk premium into individual components, such as load-following risks; RTO costs; laws or rules changing; fuel price increases; the utilities' creditworthiness, or product diversification risks (e.g. customers want "green" products or RES-designed demand-response programs). CES objects to the suggestion that changing one component – such as the enrollment window – will guarantee prices lower than those that resulted from the 2006 Auction. (CES Initial Brief at 14; Reply Brief at 12)

CES urges the Commission to reject IIEC's proposal to implement multiple enrollment windows of differing durations. IIEC, CES argues, fails to demonstrate benefits from adoption of its proposal. CES avers that IIEC's proposal would create logistical and administrative strains on the Auction process as well as on the utilities' respective Information Technology ("IT") and billing systems. CES says that while it appreciates the IIEC's motivations, IIEC's proposal is overly burdensome and would unnecessarily complicate customers' enrollment processes without providing any clearly defined benefits. (CES Initial Brief at 14-15)

CES states that IIEC's revised two-option approach would require customers to select supply options within a very short enrollment window of seven calendar days or a longer 20-day enrollment window, referred to by CES as IIEC's 7/20 proposal. CES complains that IIEC did not propose a timeline for implementation of its revised proposal and fails to provide the requisite details regarding customer education and utility administrative efforts for implementation of its proposal. (CES Initial Brief at 15)

CES says ComEd and Ameren propose modifying IIEC's 7/20 proposal by requiring the Auction Manager's certification of sufficient customer interest in the 7-day enrollment window. Staff, CES says, does not endorse the IIEC's 7/20 proposal in rebuttal testimony. CES contends there are no clear benefits to the IIEC's 7/20 proposal and that implementation could face logistical and administrative problems. (CES Initial Brief at 15-16)

CES says it supports customers' desire to receive a reasonable utility default product, but asserts that IIEC failed to clearly articulate any demonstrable benefit that would result from implementation of its 7/20 proposal. According to IIEC, adoption of the 7-day enrollment window would create an option for a customer that has the potential to avoid unnecessary risk premiums in prices for those customers who can decide more quickly whether or not to elect the utility option. According to CES, IIEC predicates its rationale solely on an unsupported and assumed correlation between a longer enrollment window and an increased risk premium. (CES Initial Brief at 16)

If the goal of the IIEC's 7/20 proposal is to mitigate price, CES claims the wholesale suppliers' responses in the NERA Supplier Survey demonstrate why the proposal should fail. According to CES, the wholesale suppliers explicitly state that a shortened enrollment window would not render the Annual Product less risky than the blended product, and that revising products in a manner that limits the ability of customers to switch suppliers will result in additional risks. (CES Initial Brief at 16)

CES states that at first blush, IIEC's 7/20 proposal seems to provide a rather elegant solution. CES maintains that upon further review, however, implementation of IIEC's 7/20 proposal is fraught with logistical and administrative problems. CES contends that IIEC's 7/20 proposal is more complex for the utilities, customers, and the RES. CES asserts that these practical problems would overwhelm both customers and the auction process itself. (CES Initial Brief at 17)

According to CES, one important and practical barrier to implementation of IIEC's 7/20 proposal is the short time remaining before commencement of the 2008 Auction. CES asserts that the multitude of steps, including customer and utility personnel education, and IT and billing system revisions that would have to occur well in advance of the 2008 Auction. CES also argues that IIEC's 7/20 proposal runs counter to the underlying purpose of the Consumer Choice Act, which is to foster a competitive wholesale and retail electricity market to benefit all Illinois citizens. (CES Initial Brief at 17, citing 220 ILCS 5/16-101(d)) CES emphasizes that the Commission must enact policies that give the customers adequate and timely information to make their choices.

CES asserts that ComEd and Ameren are incapable of implementing IIEC's 7/20 proposal without significantly confounding customers' supply decisions and disrupting the market. (CES Reply Brief at 8-9) CES also says no party explained how all of these activities will occur in the one month following the Commission's Final Order and prior to the August 31 deadline for customers to make an enrollment election. CES states that once the utilities and the Auction Manager properly identify customers, the utilities must then educate customers about these new products and enrollment options. CES further states that significant training of utility personnel and comprehensive education of customers would have to occur.

CES is concerned that significant customer confusion is likely, given that the next auction will not occur until January 2008; the enrollment window will not occur until February 2008; and the power will not flow until June 2008. Customer confusion will be compounded by the fact that the utilities are currently incapable of properly billing many of these same customers, according to CES. (CES Reply Brief at 9-10)

CES asserts that implementation of IIEC's 7/20 proposal depends largely on the nature and quality of the utilities' efforts. CES says that it does not question the utilities' desires to implement IIEC's 7/20 proposal; rather, it questions the utilities' abilities to do so. CES says it is not optimistic that the utilities can implement IIEC's 7/20 proposal without significant disruption to the market, to customers' operations, and to RES' operations. CES claims Ameren and ComEd encountered difficulties in educating customers about the structure and in executing enrollment of customers following the 2006 Auction. CES also asserts there are operational difficulties that ComEd has encountered regarding the January 2007 transition – resulting in a failure to accurately enroll, switch, and bill customers that as of the time of hearings had persisted for nearly four months. CES further argues that the utilities could have communicated better with customers during the 2006 auction process. It appears, CES says, that the utilities' have not begun to prepare materials to educate consumers about IIEC's 7/20 proposal. (CES Initial Brief at 19; Reply Brief at 4-6)

CES asserts that ComEd remains unable to properly implement customers' requests to take RES service and has been unable to bill customers at appropriate rates. CES states that as of March 21, 2007, 80 days into the post-transition period, and 131 days since the close of the 2006 enrollment window, ComEd had not identified the universe of affected customers or diagnosed the underlying problems. (CES Reply Brief at 6-7)

CES also complains that Staff asserts, without citation, that an enrollment requirement for 400 kW to 1 MW customers worked well in the ComEd service territory and will work well in the Ameren service territory, as well. (CES Reply Brief at 8, citing Staff Initial Brief at 45) CES further argues that there is no evidence Ameren is capable of properly educating 400 kW to 1 MW customers. CES also claims there is no evidence to justify a reduced enrollment window or that these customers wish to be subjected to the same administrative troubles that ComEd's customers experienced and are experiencing. (CES Reply Brief at 8)

According to CES, if the enrollment window is too short, many customers simply will accept the utility supply option, not because it is the most economical option, but rather because customers lack sufficient time within the confines of the enrollment window to implement and complete the decision-making steps necessary to evaluate the available alternatives. (CES Initial Brief at 20) In its Reply Brief, CES says that several parties fail to acknowledge the agreement reached by a number of parties and the Commission's conclusion in the Procurement Dockets regarding the appropriate length of the enrollment window for the 2006 Auction and the 2008 Auction. CES adds that most, if not all, of the current arguments in favor of a shortened enrollment window were previously presented in the Procurement Dockets. CES says the Commission rejected these prior arguments and adopted the 45-day window for the 2008 Auction. (CES Reply Brief at 5)

CES also suggests there have been changes in other factors – factors that do not restrict customer choice – that may independently reduce suppliers' bids in the 2008 Auction. CES states that as a result of the utilities' unopposed proposals to shorten the timeframe associated with post-Auction reporting requirements, wholesale suppliers will hold their prices open for seven fewer days. CES adds that in the Procurement Dockets, the Commission approved a shortened enrollment window, from 50 to 45 days, for subsequent Auctions. CES says that as a result of this shortened post-Auction reporting schedule, and previously-established shortening of the enrollment window, wholesale suppliers already will hold their prices open for twelve fewer days than they did following the 2006 Auction. CES argues that there is no justification to further reduce customers' flexibility by an additional 25 days. (CES Reply Brief at 5-6)

6. RESA's Position

RESA states that no party appears to support imposing an enrollment window on smaller non-residential customers with demands less than 100 kW. To the extent that the Commission believes such a procedure should be considered, RESA agrees with the argument of ComEd that there is minimal switching by these customers and that it would be imprudent to make it even harder for them to exercise their choice of energy provider. (RESA Reply Brief at 1-2)

According to RESA, Staff argues for its proposal to implement an enrollment window for Ameren's medium non-residential customers with demands between 100 kW and 400 kW. RESA objects to any proposal that restricts the ability of customers to exercise their choice, particularly where there is no evidence of quantifiable benefits that could result from those new restrictions. RESA says Ameren opposes Staff's proposal because its implementation would be costly and the benefits uncertain. RESA recommends that Staff's proposal should therefore be rejected. (RESA Reply Brief at 2)

According to RESA, rather than fix the problem that needs attention, wholesale supply contracts in excess of one year, Ameren, ComEd and Staff propose reducing enrollment windows for customers with a demand greater than 400 KW and to eliminate the right of customers to switch to a RES outside of the enrollment window. RESA says that Ameren, ComEd and Staff assert that the real reason auction prices were too high was because suppliers thought that customers had too much time to choose. (RESA Initial Brief at 3)

According RESA, there is no evidence to support the proposition that reducing enrollment windows will result in lower prices for power. RESA says Staff acknowledged that it has no quantification of the relationship between these two factors and so its recommendation on enrollment window length must instead rely upon judgment. Thus, RESA reasons, shortening the enrollment windows of ComEd and

Ameren as suggested by Staff may or may not result in lower electric prices. RESA argues that reducing the amount of time that customers have to make their choices will negatively impact their ability to take advantage of alternative sources of power. (RESA Initial Brief at 3-4)

RESA states that while a significant portion of Ameren's customers made their enrollment elections within 20 days, others needed more than 20 days. RESA claims there is no evidence supporting the assumption that all customers that made their enrollment election in more than 20 days would suddenly gain the ability to make decisions before that deadline. Ameren says a significant number of notices were received in the final three days of the window. RESA, however, disputes Ameren's assertion that it is reasonable to assume that this group will always act at the last minute, regardless of the duration of the window. RESA suggests that it is just as reasonable to assume that a large number of those customers made a decision in the last three days because they needed the full amount of allotted time to make their decision. (RESA Initial Brief at 4-5)

As for Ameren's suggestion that it is significant that the auction prices for Ameren's BGS-LFP supply were about $85 per MWh and for smaller customers on the blended supply product were about $65 per MWh, RESA questions whether the price differential might reflect the fact that suppliers thought that BGS-LFP customers had too long to make their decision. RESA suggests the reason prices for auction products utilized for large nonresidential customers were considerably higher than the prices for residential and smaller, non-residential customers was most likely due to a greater degree of risk to wholesale supplier that large customers will switch to RES service. That risk exists regardless of the windows given to each group, according to RESA. (RESA Initial Brief at 5-6)

7. AG's Position

The AG supports IIEC's recommendation that customers must know the actual price of electric service before they can be expected to agree to pay that price. According to the AG, price is an essential term of any electricity purchase, and consumers must know that price before they can be expected to choose whether to buy from the utility or another supplier. According to the AG, any method that expects customers to choose service before they know the price is unreasonable and unfair to consumers. (AG Reply Brief at 4)

The AG believes any process used to obtain electric supply in the future must accommodate the needs of a wide range of customer groups, including those which need more time to consider and implement electricity purchasing decisions. (AG Reply Brief at 4-5)

8. Commission Analysis and Conclusions

The enrollment window was described as the fixed period of time, after the announcement of the auction based electricity prices, within which customers are permitted to elect to take the annual fixed price auction product. (IIEC Brief at 7) As explained in of the Procurement Orders, the length of the enrollment period is a matter of judgment; the challenge is to strike the right balance between providing customers with sufficient time in which to make decisions, on the one hand, and on the other, lower the premium that might result if suppliers were forced to hold out fixed price call options for longer periods of time, particularly in the case of load-following supply contracts. (Ameren Procurement Order at 213; ComEd Order at 182)

In those Orders, the enrollment window for the 2006 Auction was set at 30 days for customers with demands greater than three megawatts. For Ameren, an enrollment window of 50 days applied to customers with demands between 1 MW and 3 MW. For ComEd, an enrollment window of 50 days applied to customers between 400 kW and 3MW.

In the instant proceeding, Staff, ComEd, Ameren and IIEC propose to shorten the enrollment windows in order to reduce risk premiums associated with longer windows. Some of these parties also recommend more uniformity in the ComEd and Ameren windows. CES and RESA oppose the proposals to shorten the enrollment windows.

In its testimony and briefs, Staff proposes implementation of a 20-day enrollment window, to be applied to Ameren and ComEd customers with demands between 400 kW and 1 MW. Staff argues that this will lower risk premiums and also result in Ameren customers of this size being treated the same as ComEd customers of this size.

IIEC believes a single 20-day enrollment window for larger nonresidential customers would be an improvement over the lengthier enrollment windows in the 2006 Auction. IIEC recommends going a step further, proposing that larger customers using the annual fixed price product, over 400 kW on ComEd's system and over 1 MW on the Ameren system, be given the option to select a 7-day enrollment widow for choosing the annual fixed price product.

Under this IIEC proposal, as the Commission understands it, large nonresidential customers, at some time shortly after the conclusion of this proceeding, would affirmatively state their intention of accepting a 7-day enrollment window. Depending upon the level of interest by customers and suppliers, a separate auction section could be conducted for the 7-day enrollment window subgroup. The Auction Manager, in consultation with Staff and the utilities, would have the discretion to decide whether an auction would be conducted for this subgroup. If a separate auction is not conducted for this subgroup, those customers that accept a 7-day enrollment window would not be obligated to make a decision during that 7-day period. In that case, there would be a single auction for CPP-A eligible load and all eligible customers will have the standard

20-day enrollment window to make their elections. The expectation is that the shorter enrollment period could reduce the auction price ultimately adopted.

CES opposes both Staff's proposal to reduce the enrollment window to 20 calendar days and IIEC's proposal to create an optional 7-calendar day enrollment window. Among other things, CES complains about the lack of quantitative evidence regarding risk premiums embedded in supplier bids. Additionally, CES criticizes the analysis that was presented by ComEd. CES asserts that retail customers simply require more than 20 days to analyze their supply options. CES also claims that the NERA Supplier Survey found that shorter enrollment windows would not affect potential bidders' bids.

As for the IIEC proposal, CES argues that the utilities are not capable of implementing the proposal. CES further asserts that it would be confusing for customers and would create logistical and administrative problems. Most of RESA's arguments, which are summarized above, are similar to those of CES. RESA adds, however, that the real problem is wholesale supply contracts in excess of one year, not risk premiums built into supplier bids because customers had too much time to choose.

The Commission has reviewed the record on these issues, including AM Exhibit 1.8, the results of the NERA Supplier Survey. Based on its review, the Commission agrees with those parties who suggest the report and other evidence support the view that suppliers believe the risk of customer switching directly imparts risk onto suppliers. It is clear to the Commission from this and other evidence of record that a longer enrollment window increases the risk to suppliers, all else equal.

Next, the Commission reiterates its belief that determining the length of the enrollment window is a matter of judgment and involves balancing competing interests. The Commission believes that the NERA Supplier Survey as well as the quantitative study presented in the testimony of ComEd witness McNeil demonstrate that a shorter enrollment window will decrease risk to suppliers. The Commission also agrees with those who suggest it is not possible to select an optimal enrollment window length.

Based on its review, the Commission finds the testimony of those witnesses advocating an enrollment window of 20 calendar days to be convincing. While it may be true that some customers simply cannot make a decision during a 20-day window, the same could be said for a longer window. All things considered, the Commission approves the Staff recommendation to adopt a standard 20-calendar day enrollment window. The Commission also approves application of that window for all nonresidential customers with demands greater than 400 kW as proposed by Staff.

The Commission believes this window strikes an appropriate balance. It provides customers with a reasonable period to consider their options, while attempting to further the important objective of lowering auction prices by reducing any risk premiums associated with longer windows. In the Commission's view, "customer choice" has more meaning when customers have options which include, among others, access to power and energy at a relatively reasonable price from the utility.

As a point of clarification, the Commission also observes that the conclusion above is not intended to result in a combined auction for Ameren's customers with demands between 400 kW and 1 MW with those with demands over 1 MW. While some had suggested this combination, it appears that ultimately, no party supported such a combination.

The final matter is IIEC's proposal for an optional 7-calendar day enrollment period for those customers wishing to obtain a lower auction price in exchange for making a decision more quickly. This proposal is also opposed by CES and RESA. Some find it ironic that the these two parties, who claim to have retail customers interests at heart by advocating for the ability to choose a RES during longer enrollment periods and at any time whatsoever, oppose an optional program for customers. Furthermore, the concerns expressed about administrative burdens on the utilities, offered by these parties, are not convincing.

IIEC, which by definition represents consumer interests of its members, believes it possible there will be sufficient interest in the optional 7-calendar day enrollment program to allow for a separate auction segment. While the Commission has some skepticism in that regard, the proposal does offer an opportunity that should not be foreclosed. While there would undoubtedly be costs associated with this program, the potential benefits are relatively large. Most importantly, it provides an opportunity for certain customers to have an additional choice and to save money.

This 7-day program could also provide insight into the extent to which customers are interested in the opportunity to save money while staying on bundled utility rates. Additionally, it could provide valuable information about the ability of some customers to make quick decisions. Having considered all of the arguments surrounding this proposal, the IIEC proposal, as clarified in the rebuttal testimony of ComEd witness McNeil and by Ameren, is hereby approved. Discussion and determinations relating to the use of customers' choice of an enrollment window to segment them into separate auction product groups are also contained in Section III.F.3 above.

B. Proposed Modifications To ComEd's Switching Rules

1. Staff's Position

Staff states that the existing tariffs possess various rules about switching to and from the various power and energy options, outside of enrollment windows. ComEd's switching rules are somewhat more liberal than Ameren's which, according to Staff, could account for some of the additional premium embedded in ComEd's large customer fixed price product. Staff says that ComEd permits relatively large nonresidential customers who automatically renew fixed price power and energy service from ComEd to elect to obtain electric power and energy supply service from an alternative supplier prior to the end of such customer's following May monthly billing period, while Ameren does not permit such flexibility.

Staff asserts that ComEd's tariff places additional risk on suppliers, since suppliers have no way to determine how many customers will leave throughout the year. Thus, to reduce the premium embedded in the price of ComEd's large customer fixed price supply service, Staff recommends that ComEd's tariff be modified to eliminate this additional flexibility, rendering ComEd's tariff like Ameren's tariffs. The proposed changes are shown in ICC Staff Exhibit 1.1. (Staff Initial Brief at 48-49)

Staff says ComEd witness McNeil supported the Staff's recommendation, but argued that it should only apply to customers who default to Rate BES-NRA as a result of their actions or inactions during the enrollment window following the 2008 Illinois Auction. Staff agrees that Mr. McNeil's suggestion presents the fairest and most appropriate way of implementing the Staff proposal. (Staff Initial Brief at 49)

Staff notes that CES argued that the Staff/ComEd proposal puts restrictions on switching that may prevent customers from receiving the wide array of products and services that are available in a competitive retail marketplace. In Staff's view, the CES position rings hollow because ARES are under no similar obligation to allow their customers to walk away from contracts on a moments' notice. Staff also asserts that ARES that voluntarily provide this option would surely require compensation for it through a risk premium. According to Staff, ARES work in a free-market environment where they can flexibly customize each contract for each customer, providing one level of optionality for some, different levels for others, and no optionality for the rest. Staff states that in contrast, the utilities work in a regulated environment, where such matters are typically subject to protracted proceedings and then reduced to tariffs.

Allowing meaningful flexibility between such proceedings would be difficult to impossible, Staff says. Staff asserts that in this environment, it is necessary to make choices that may not be optimal for every individual customer, but are still just and reasonable and in the public interest. (Staff Initial Brief at 49-50)

Notwithstanding the objections of the CES, Staff recommends that the Commission approve the Staff proposal, as clarified by ComEd, obligating customers beginning the June 2008 to May 2009 planning year on Rate BES-NRA to remain on that service for the entire planning year. According to Staff, this proposal would not only eliminate one difference that currently exists between the ComEd tariff and Ameren tariffs, it can also be expected to lower the risk premium for the ComEd large-customer product in the next auction. (Staff Initial Brief at 50)

Despite CES' claims, Staff argues that it and ComEd are not thwarting the development of a competitive wholesale and retail market in Illinois. According to Staff, CES provides no authority for its position that fostering a competitive wholesale and retail market is the "underlying purpose" of the Customer Choice Act. Staff says CES fails to acknowledge that under the Customer Choice Act the Legislature also found that safety, reliability and affordability of electric power is not to be sacrificed to competitive pressures and safeguards are to be implemented in order to ensure that the public interest is served. Staff maintains that a shortened window will reduce risk which should lead to more affordable electricity which clearly is in the public interest. Finally, Staff argues that the declaration of findings and intent section is "nothing more than prefatory" and "[a]s such, it is of no substantive or positive legal force." (Staff Reply Brief at 34, citing Monarch Gas Co. v. Illinois Commerce Commission, 261 Ill.App.3d 94, 99 (1994))

2. ComEd's Position

ComEd supports Staff's proposal and recommends that, if accepted and implemented, it would apply only to customers who defaulted to Rate BES-NRA as a result of their actions or inactions during the enrollment window following the 2008 Illinois Auction. That is, customers who defaulted to Rate BES-NRA on January 2, 2007 would be allowed to leave Rate BES-NRA to switch to a RES at any time during the term of the CPP-A delivery period, which extends through the end of the May 2008 billing period. ComEd says this recommendation would not retroactively affect the ability of those customers to exercise that choice through the May 2008 billing period.

ComEd states that if those customers who are currently being served under Rate BES-NRA either affirmatively elect Rate BES-NRA or make no other rate option or supply choice during the enrollment window following the next auction (scheduled for January 2008), and they do not elect to switch to a RES on or before the start of their June 2008 monthly billing period, then they will be obligated to take service under Rate BES-NRA for the full term beginning June 2008 through the May 2009 billing period. (ComEd Initial Brief at 56)

ComEd does not agree with the specific tariff modifications that Staff proposed in Staff Ex. 1.1 to accomplish this change to the switching rules. According to ComEd, Staff's proposed language continues to allow a narrowly defined, small group of customers to switch from Rate BES-NRA to a RES during the CPP-A contract term. ComEd says the customers exempted from the new switching rules, per Staff's proposal, are those customers who are re-classified from CPP-B supply group to the CPP-A supply group by virtue of load growth. ComEd claims it is not necessary or desirable to provide this exemption for any group of customers.

ComEd says that all CPP-A eligible customers for the next auction will be identified when the customer supply groups are determined. The customer data used to determine the supply groups extends only through May of this year, ComEd adds. ComEd plans to notify all CPP-A eligible customers, including those who have been reclassified from CPP-B to CPP-A due to load growth, of their upcoming status and provide them with educational information regarding that status, as early as the middle of this summer. ComEd argues that because these customers will be fully educated with respect to their upcoming status months in advance of the opening of the enrollment window after the 2008 auction, there is no reason to allow them to have additional choice regarding electricity supply during the June 2008 through May 2009 term of service. ComEd provided a marked-up copy of Staff's proposed tariff language showing the recommended modifications to the tariff to implement this change, ComEd Ex. 2.2, which ComEd recommends be adopted instead of Staff's proposal. (ComEd Initial Brief at 57)

CES opposed these changes to the migration rules on the basis that they restrict the customer's ability to exercise their choices beyond those measures currently included in the Illinois Auction structure. ComEd disagrees with this argument. ComEd says the purpose of making this change is to reduce the risk to suppliers that is embedded in the current product design, therefore allowing for lower prices for the customers who choose not to switch from the utility. In ComEd's view, there is by necessity, some amount of judgment to be applied in setting these rules. ComEd argues that on the one hand, maximum customer freedom to leave the utility supply will also maximize the risk to the auction suppliers, driving the auction prices up. For fixed price supply to larger commercial and industrial customers, ComEd says that price impact has been shown to be significant. On the other hand, ComEd asserts that striving to find a means to reduce the risk premium included in the price of the utility's fixed price offering will inevitably require elimination of some of that freedom and flexibility in choice.

ComEd believes that the current rules have created a product that is not attractive to most large customers, as evidenced by their post auction supply choices. Therefore, ComEd believes that some changes are going to be necessary if that outcome is to be different in any future auction. ComEd believes that this combination of a shorter enrollment window and an elimination of switching outside of the enrollment window preserves most of the fundamental customer options currently available, while seeking to reduce price premiums to cover the amount of migration risk currently embedded in the product. (ComEd Initial Brief at 57-58)

In its Reply Brief, ComEd maintains that although CES and RESA oppose this proposal and seek to maintain the existing migration rules, the Commission should reject their position. ComEd believes the change will reduce the risk to suppliers that is embedded in the current product design, therefore allowing for lower prices for the customers who choose not to switch from the utility. ComEd concurs in Staff's assessment that CES's opposition to switching restrictions "rings hollow," noting that ARES are under no similar obligation to allow their customers to walk away from contracts on a moments' notice. (ComEd Reply Brief at 58)

3. CES' Position

CES states that Staff proposes for the Commission to modify ComEd's large non-residential customers' rights to leave fixed-price service from ComEd and that ComEd supports Staff's recommendation, which would render ComEd's migration rules more akin to Ameren's. CES claims the practical effect of these modifications would be to restrict customers' access to the competitive market until the next enrollment window. CES urges the Commission to reject this proposal. (CES Initial Brief at 25)

According to CES, limiting a customer's ability to switch to a RES is not justified, especially when considered in tandem with proposals to reduce the enrollment window from 45 days to 20 days. CES says this proposal targets customers that do not elect RES or ComEd service during the enrollment window. CES suggests that a portion of these customers may have failed to make an election because they lacked sufficient time in which to make a supply decision, and urges the Commission to maintain structures that foster competitive market conditions in which customers are allowed to switch and have access to the competitive retail market. CES argues that if customers can obtain supply arrangements by switching to alternative suppliers that meet their needs, they should have the right to do so, free of any newly-instituted switching restrictions that differ from those currently in effect. (CES Initial Brief at 25)

Staff and ComEd, CES says, justify their respective proposals by claiming these restrictions are necessary to reduce risk premiums embedded in the utilities' Annual Products. CES claims that neither Staff nor ComEd provide any evidentiary justification for their claims that customer switching outside of the enrollment window leads to any measurable level of increased risk. CES further asserts that neither the Auction Manager nor any wholesale supplier provides any testimony identifying this issue as a meaningful risk. CES argues that with no evidentiary support, the Commission has no legitimate basis upon which to conclude that customer switching outside of the enrollment window leads to risk and a related risk premium. To do so, CES contends, would amount to speculation. (CES Initial Brief at 26; Reply Brief at 17)

CES states that the underlying purpose of the Customer Choice Act is to foster a competitive wholesale and retail electricity market to benefit all Illinois citizens. CES claims that Staff and ComEd would have the Commission "deliberately" thwart this mandate. CES asserts that this danger would be increased if the Commission were to reduce the enrollment window to just 20 days. CES asks the Commission to reject these proposals as being contrary to the pro-competitive goals of the Customer Choice Act, and preserve and expand the customers' ability to switch to a RES after the enrollment window closes if the customer defaults to the utilities' fixed-price, bundled rate. (CES Initial Brief at 26)

In its Reply Brief, CES suggests that the Commission should revise Ameren's migration rules for Ameren's current Annual Customers (those customers with demands of 1 MW or greater) to mirror those presently being used for ComEd's Annual Customers. CES claims that while neither ComEd nor Staff offered record evidence to demonstrate benefits that would occur as a result of limiting customers' ability to choose, CES says it explained how Ameren's customers would benefit by having additional flexibility. (CES Reply Brief at 15 and 18-19)

CES states that the Commission should reject ComEd's and Staff's proposals to restrict ComEd's Annual Customers' ability to switch to RES service outside of the enrollment window. Decisions concerning customers' ability to participate in the competitive market, CES argues, should be made to benefit those customers. CES claims that without wholesale bidder or customer corroboration, neither ComEd nor Staff can justify elimination of ComEd's Annual Customers' ability to switch to RES service. CES believes this is especially true when that proposal is considered in tandem with proposals to reduce the enrollment window from 45 days to 20 days. CES asserts that the proposal to revise the current migration rules for ComEd's Annual customers lacks any demonstrated benefit and restricts customers' access to the competitive retail market. (CES Reply Brief at 17)

4. Commission Analysis and Conclusions

As explained above, the existing tariffs contain rules about switching to and from the various power and energy options, outside of enrollment windows. ComEd currently allows relatively large nonresidential customers who automatically renew fixed price power and energy service from ComEd to elect to obtain power and energy service from an ARES prior to the end of customer's May monthly billing period. Ameren does not offer this switching accommodation.

Staff proposes that ComEd's tariff be modified to eliminate this option, in order to make it more like Ameren's and to reduce the premium embedded in the price of ComEd's large customer fixed price supply service. Subject to certain revisions, ComEd endorses Staff's proposal, but says the modification would not retroactively affect the ability of those customers to exercise that choice through the May 2008 billing period.

CES' primary basis for objecting to this proposal is that there has been no quantitative demonstration that customer switching outside of the enrollment window leads to risk and a related risk premium. Additionally, CES argues that this proposal is not favorable to customers and is contrary to the objective of enhancing the competitive marketplace.

In the Commission's view, this issue, like many other regulatory issues, is one that requires a balancing of interests. CES and RESA oppose most mechanisms that would impede the ability of customers to switch from utility supply to RES supply at any time. While the Commission understands both the underlying concern and the perspective of CES and RESA, it also has an obligation to consider the interests of those customers who, for whatever reason, stay with the utility supply. Put another way, the Commission believes "customer choice" has more meaning when customers have options which include, among others, access to power and energy at a relatively reasonable price from the utility.

While the quantitative evidence regarding the risk premium suppliers include in bids due to customer switching is admittedly less than optimal, the Commission has no doubt that the likelihood of customers choosing RES supply impacts supplier bids. It is a fundamental economic principal and it cannot be ignored, particularly in the case of load-following supply contracts. While there are limits to how far the Commission is willing to go to reduce these risk premiums, all things considered, the Commission believes Staff's proposal, as clarified by ComEd, is reasonable.

In conclusion, the Commission believes that the potential to lower auction prices, by reducing the risk premium included in supplier bids, justifies the change that Staff has proposed. Further, the change will make ComEd's tariffs more similar to those of Ameren, thereby providing a benefit of uniformity. Staff's proposal, as clarified by ComEd, is reasonable and is adopted.

C. Proposed Changes to Ameren's Switching Rules

1. IIEC's Position

IIEC argues that the pre-qualification approach in Ameren's Rider MV - Market Value of Power and Energy ("Rider MV"), should be modified to eliminate the opt-out requirement for Rider BGS-LFP customers. IIEC states that under Ameren's current policy, BGS-LFP customers are required to notify Ameren that they do not wish to take the BGS-LFP product (opt out). IIEC says if they fail to do so, they would default to that product. IIEC recommends that the tariff be modified to require the customer to opt-in to this service and to designate Ameren's RTP-L as the default product. (IIEC Initial Brief at 11)

According to IIEC, the current opt-out provisions of the tariff have had unintended consequences. Specifically, IIEC says customers who failed to opt-out defaulted to the BGS-LFP product are now committed to that product for a period of 17 months, before they can take RES supply. IIEC states that they are locked into paying the BGS-LFP product's very high September Auction price for their electricity. Going forward, if they do not opt-out, IIEC says customers will be required to take this product for a period of 12 months before they can change suppliers. (IIEC Initial Brief at 11)

IIEC argues that while this issue now only affects a relatively small number of customers, less than 30, Ameren's pre-qualification procedure should no longer require customers to opt-out of BGS-LFP service. IIEC contends that the procedure should be modified to incorporate an opt-in provision, with default service through the RTP-L product for customers that do no opt in but fail to arrange alternative supply. (IIEC Initial Brief at 11)

IIEC proposed, in the Ameren Power Procurement Case, Docket 05-0160 et al., that customers "prequalify their load" for the Large Fixed Price product in the Ameren auction. IIEC's specific proposal was that customers be required to certify they were eligible to take the LFP product, should they ultimately elect to do so. IIEC says its proposal was intended to reduce load risk suppliers faced by identifying load that, for whatever reason, could not or would not use the LFP product. Under this approach, IIEC says customers with contractual commitments to retail electric suppliers other than the utility and unable to take the LFP product would identify themselves as being ineligible to take that product. IIEC asserts that elimination of that load would give potential suppliers a better handle on the amount of load they might be required to serve if they were the successful bidders in the LFP auction. (IIEC Initial Brief at 15)

According to IIEC, under the pre-qualification process implemented by Ameren, customers were simply asked if they wanted their load included in the auction. IIEC claims this was not the same as asking the customer to certify they were, in fact, eligible to purchase the LFP product. IIEC states that at the time Ameren implemented its version of pre-qualification, very few Ameren customers were actually taking supply from a RES. IIEC says there were only two such customers on the CILCO system, seven on the CIPS system and fourteen on the IP system. IIEC asserts that it is unlikely that in the summer of 2006, when Ameren implemented this approach, that those customers on RES supply had contracts that extended beyond the end of the rate freeze in January 2007. IIEC claims there were probably few, if any, customers ineligible for the LFP product at that time. (IIEC Initial Brief at 15-16)

IIEC says now many more large Ameren customers (above 1 MW) are on RES supply. IIEC states that CILCO has 90 such customers; CIPS has 195 such customers; and IP now has 269 customers on RES supply. In IIEC's view, this makes it more likely that there will be customers who, because of their contractual commitments, will not be eligible to take the LFP product. Moreover, now that the rate freeze is over and a larger number of customers have RES supply, IIEC believes there is a greater likelihood that some customers have contracts that extend beyond the end of the first auction period, May 2008. (IIEC Initial Brief at 16)

The objective of "prequalification," IIEC argues was to reduce load uncertainty for bidders in the LFP auction. IIEC claims that reduced uncertainty, in turn, would mitigate the risk premium built into suppliers' bids and ultimately lower the price of the LFP product. IIEC says if a pre-qualification procedure where the customer would "certify its eligibility" for the LFP product is properly implemented, it can fulfill its intended purpose. IIEC indicates that Ameren witnesses have agreed with continued use of this approach and with the need to have customers "certify their eligibility." (IIEC Initial Brief at 16, citing Ameren Ex. 7.0 at 3-4:57-72)

IIEC recommends that the Ameren pre-qualification procedure should continue, and large customers should be required to "certify" their eligibility for the LFP product, defaulting to RTP-L if they choose not to enroll in LFP service and RES service has not been arranged. (IIEC Initial Brief at 17)

In its Reply Brief, IIEC says that to the best of its knowledge, no other party addressed this issue. Therefore, IIEC believes that this recommendation that customers be required to certify their eligibility (i.e., prequalify their load) should be adopted. That is, IIEC says the prequalification requirement should be retained. (IIEC Reply Brief at 19)

2. Ameren's Position

Ameren recommends that, the Commission approve IIEC witness Mr. Stephens' proposal reversing the opt-out policy to an opt-in policy for future auction periods, consistent with IIEC's Initial Brief at pages 10-11. (Ameren Initial Brief at 51-52; Reply Brief at 17)

Ameren's customers taking service under BGS-LFP (also known as "Rider BGS-L" or "BGS-4") must have a demand of 1,000 kilowatts or more. Customers with demands at or over 3,000 kW must have also signed and returned a non-binding "Pre-Qualification Form" stating they wish to remain eligible for the BGS-LFP product. Customers meeting one of these two conditions may elect to take BGS-LFP service during the Open Enrollment Period. (Ameren Initial Brief at 52)

Ameren says that IIEC proposed modifying the pre-qualification form, whereby a customer would certify they are eligible to take the auction product. Ameren agrees this change is warranted. Ameren says that prior to the initial auction, all current customers with demands at or above 3,000 kW returned their Pre-Qualification Forms affirming their desire to have their loads included in the auction segment, but not requiring them to either certify eligibility or commit to Rider BGS-L service. Such result provided suppliers with no new information to assess the potential risk, and cost, of serving the BGS-LFP load.

IIEC's suggestion to modify the form so that customers certify that they are eligible to take the auction product should they elect to do so is more likely to result in some customers removing themselves from consideration. Ameren says this is so because these customers are likely taking service from a third party supply whereby the contractual provision may preclude the customer from the abandoning the contract earlier than the contract term. (Ameren Initial Brief at 52-53)

Ameren recommends that the Commission approve IIEC witness Mr. Stephens' proposal modifying the pre-qualification form whereby a customer would certify it is eligible to take the auction product. (Ameren Reply Brief at 17, citing IIEC Initial Brief at 10-11).

3. RESA's Position

RESA states that IIEC's proposal to make Rider BGS-L an opt-in rather than an opt-out would result in a fair set of rules that impose migration restrictions only on those customers that chose to take service under Ameren's Rider BGS-L. According to RESA, that proposal contrasts sharply with the Staff's proposal, which ComEd supports, to require customers that default into ComEd's Rate BES-NRA because they make no affirmative choice, to take service for the next year under that rate.

RESA claims there is no evidence that imposing migration restrictions will result in lower auction prices, yet it is undisputed that those restrictions will harm customers that wish to change suppliers at some point after the close of the enrollment window. RESA recommends that the Commission therefore reject the proposal to modify ComEd's migration rules. (RESA Reply Brief at 3-4)

4. Commission Analysis and Conclusions

Under Ameren's current tariffs, BGS-LFP customers who do not wish to take BGS-LFP service from Ameren are required to notify Ameren that they wish to opt out of the LFP product; if they fail to do so, they default to that product. IIEC proposes that the prequalification provision in Ameren's Rider MV be modified to eliminate the current opt-out requirement for Rider BGS-LFP and replace it with an opt-in process. Under IIEC's proposal, default service would be available through Rider RTP-L for customers who neither opt-in to LFP service nor arrange alternative supply. The proposal is endorsed by Ameren as well as by RESA.

IIEC also proposes to modify the prequalification form whereby a customer would be required to certify that it is eligible to take the auction product. This proposed change was also endorsed by Ameren.

It appears to the Commission that neither of IIEC's proposals is currently contested. The Commission finds that both proposals will likely improve the 2008 Auction and they are hereby approved.

D. Reduced Time for Utilities to Make Informational Filing

ComEd recommended that the amount of time that the utilities are allowed to make their supply charge informational filing with the Commission, following a declaration of a successful auction result, be reduced from nine business days to two business days. This eliminates seven business days of price risk for suppliers (with respect to the CPP-A load) because the period during which they are exposed to market price movements extends from the final day of the auction to the end of the enrollment window. Reducing the time that ComEd is allowed to make its supply charge informational filing is expected to reduce the period of time in which the suppliers are exposed.

Having reviewed the record, the Commission believes that this proposal constitutes an improvement to the auction process; no party opposed it and the proposal is hereby approved.

V. CREDITWORTHINESS, AGENCY ARRANGEMENTS AND RELATED ISSUES

A. Calculation of Tangible Net Worth

1. Staff's Position

Illinois Auction applicants may be granted an unsecured credit limit that can be used to satisfy the SFC collateral requirements, which equals the lesser of a percentage of Tangible Net Worth ("TNW") or a cap, both of which depend on the applicant's (or the guarantor's) credit rating as set forth in Table A, provided in Section 6.4 of the SFCs. The Illinois Auction credit and application team, which includes representatives from ComEd, Ameren, the Auction Manager team and Commission Staff, calculates each applicant's unsecured credit limit using financial statements and credit rating information provided in the Part 1 Application.

Staff recommends modifying the Part 1 Application to require applicants to provide their calculation of TNW, to show how they calculated it, and to provide citations to their financial statements for each component of that calculation. The applicant's TNW calculation would supplement the current review process in which the credit and application team calculates each applicant's TNW. (Staff Initial Brief at 24-25)

The SFCs define TNW as total assets, less intangible assets and total liabilities. Staff asserts that calculating TNW is not necessarily straightforward because intangible assets, e.g. goodwill, patents, copyrights and trademarks, are not always provided in a uniform format and some entities present intangible assets in the notes or discussions of their financial reports rather than in the balance sheet. Staff adds that the financial statements used to calculate TNW often contain well in excess of 100 pages and may include information for the supplier as well as affiliated entities. Staff believes its recommendation would improve the accuracy of the TNW calculation as it would provide an estimate of TNW against which the credit and application team can compare its own estimate. Staff argues that if those two estimates differ, the credit and application team would be able to determine the sources of any differences and assess which estimate is more accurate. (Staff Initial Brief at 25)

Staff states that the Auction Manager and Dynegy oppose Staff's TNW proposal, arguing that it may cause suppliers to dedicate more resources to the application process. In Staff's view, any additional resources committed to the application process would be immaterial since the TNW components come from that applicant's own financial statements and no entity is in a better position to identify the components of a supplier's TNW than the supplier itself. Staff argues that applicants' financial reports are prepared by personnel at the applicant with specialized accounting skill and knowledge.

Staff says that in response, the Auction Manager offered that members of her team would provide to the credit and application team a TNW calculation for each applicant that would be documented and checked. Staff contends, however, that having the Auction Manager team calculate TNW would not necessarily improve the accuracy of TNW calculations because the Auction Manager team does not include any accountants and its members have not prepared financial reports for companies in accordance with the Securities and Exchange Commission regulations. Staff asserts that in contrast, applicants, including "in-house" accounting personnel, are more knowledgeable about an entity's intangible assets than an outside party, such as the Auction Manager team, and would likely provide more accurate TNW calculations, including citations, and do so more efficiently than would the Auction Manager team. (Staff Initial Brief at 25-26)

Staff says the Auction Manager and Dynegy also argue that the TNW calculation is prone to error and can only increase the number of deficiencies associated with the Part 1 Application. Staff argues that deficiencies occur only if an applicant provides incomplete or incorrect information regarding its TNW calculation in the Part 1 Application; no deficiencies occur when an applicant provides a TNW calculation with consistent and complete references to the financial statements even if the credit and application team reaches a different conclusion regarding that supplier's TNW. (Staff Initial Brief at 26)

According to Staff, the Auction Manager, Dr. LaCasse, proposed amending Staff's TNW proposal to make it optional for suppliers, which she asserts will minimize deficiencies at the Part 1 Application stage as it will provide an incentive for suppliers to calculate TNW accurately with correct citations. Staff asserts that to the extent suppliers attempt to avoid deficiencies that must be remedied during the application review process, they must exercise the same degree of care in completing the TNW calculation as they would other Part 1 Application requirements. It is illogical, Staff claims, to assume that making the TNW calculation optional provides a greater incentive to provide accurate information than would if the TNW calculation were a requirement. (Staff Initial Brief at 27)

Staff asserts that the Auction Manager's arguments notwithstanding, it is possible that during the next auction, a TNW calculation could serve as the basis for a supplier's unsecured credit limit, and the most accurate TNW calculation should serve as the basis for that determination. Thus, Staff recommends approval of its TNW proposal because it would improve the validity of any TNW calculation that might be used to determine a supplier's unsecured credit limit cap. (Staff Initial Brief at 27)

Staff states that contrary to Dynegy's and ComEd's arguments against Staff's TNW proposal, requiring suppliers to provide a TNW calculation with citations should not require significantly more time or resources as the TNW calculation is based on each supplier's own financial statements and avoiding deficiencies only requires that suppliers use the same care in preparing the TNW calculation as they would for other Part 1 Application requirements. Staff says its TNW proposal is very similar to the existing Part 1 Application requirement that an applicant provide its current credit ratings and supporting documentation, e.g. a print-out from the rating agency's website, showing the name of the rating agency, the type of rating, and the rating of the entity.

Staff states that nonetheless, when reviewing applications, the credit and application team independently verifies the applicant's credit ratings and reaches consensus regarding the amount of unsecured credit that should be granted to an applicant. (Staff Reply Brief at 22-23)

Staff argues that even if additional demands on supplier resources were accepted as a legitimate concern, that concern could and should be addressed without rejecting Staff's TNW proposal. In Staff's judgment, if limiting supplier resources required during the application process is such a great concern, it would be better to eliminate the requirement that suppliers provide their current credit ratings and supporting documentation, which is easily obtained through the Internet free of charge, than to omit a requirement on suppliers to provide a TNW calculation with citations. (Staff Reply Brief at 23) In Staff's judgment, greater benefit would be derived from requiring suppliers to provide their TNW calculation -- which is relatively complicated given that various methods exist for reporting intangible assets and the length of financial statements -- rather than current credit ratings, which is relatively simple in comparison to the TNW calculation and requires little specialized knowledge or skill. (Staff Reply Brief at 24)

Staff says that although Dynegy's and ComEd's arguments against Staff's TNW proposal attempt to call into question the validity and reliability of the TNW calculation when calculated by the supplier itself, in reality, Staff's TNW proposal is similar to existing Part 1 Application requirements. Moreover, Staff believes it would be more beneficial than the existing Part 1 Application requirement relating to credit rating documentation and would likely increase the accuracy of any TNW calculations that may be used as the basis for a supplier's unsecured credit limit during the next auction.

Staff does not consider the Auction Manager's proposal to make the TNW calculation optional a reasonable compromise. According to Staff, requiring suppliers to provide and support their TNW calculation will assist the credit and application team, and this benefit should not be diminished or jeopardized by making the TNW calculation optional for suppliers. Staff also considers it unlikely that suppliers would be inclined to volunteer their TNW calculation as it could only limit the amount of unsecured credit they are granted under the SFCs because unsecured credit limits equal the lesser of a percentage of TNW or a cap that varies according to credit rating. (Staff Reply Brief at 24-25)

Staff states that under Dr. LaCasse's compromise proposal the Auction Manager team would calculate and annotate the TNW for each applicant that does not provide its own TNW calculation. Staff claims this aspect of the compromise proposal misses the point of Staff's proposal. Staff believes its proposal promotes more accurate TNW calculations by supplying a TNW calculation for comparison purposes from an entity with firsthand knowledge regarding the financial statements used to obtain data to perform the calculation.

Staff Data Request 1.04(D) asked Dr. LaCasse whether her team provided an estimate of each applicant's TNW to the credit application team. (Staff Reply Brief at 25, citing Staff Cross Ex. 11) Staff says that although Dr. LaCasse stated she could not confirm what information her team actually provided to the credit application team, she agreed it would be typical for the Auction Manager team to provide a "preliminary and unchecked" TNW calculation. Her testimony implies the Auction Manager team could provide a verified TNW calculation but this implication is implausible since the Auction Manager team has no expertise in financial reporting. (Staff Reply Brief at 25-26)

2. ComEd's Position

ComEd supports the compromise position suggested in the rebuttal testimony of Dr. LaCasse. Under this compromise position, applicants would be given the option to provide a TNW calculation with supporting citations to the financial statements, but would not be required to do so. Applicants who chose to provide the optional information would be assured that the credit and evaluation team would have it available for consideration when coming to its determination. If the team reached a different conclusion than proposed by the applicant, the reasons for the difference would be provided to the applicant. For those applicants who chose not to provide the information, the Auction Manager team would prepare the necessary TNW calculation with references to financial statements and would provide it to the credit and application team for use in its determinations. (ComEd Initial Brief at 25)

ComEd asserts that this compromise solution would accomplish a significant objective of the Staff's recommendation by enabling applicants to provide details about their tangible net worth for use in the application process, while freeing applicants who decide not to provide the information from the need to expend resources on the proposed TNW submission. ComEd claims it will also avoid an unnecessary increase in Part 1 Application deficiencies, which Dr. LaCasse predicts would likely result from a mandatory TNW calculation and support requirement. Finally, ComEd says it could further the goal of maximizing participation in the auction by relieving potential suppliers of additional burdens posed by the application process. (ComEd Initial Brief at 25-26)

In its Reply Brief, ComEd urges the Commission to resolve this issue in a manner that takes into account the Auction Manager's concerns about the potential for increased application deficiencies that a TNW calculation requirement would pose with the possible consequence that a supplier may be excluded from the auction for failing to remedy such a deficiency. ComEd also suggests that the Commission should note that the TNW calculation was completely superfluous and unnecessary for the 2006 Auction as the unsecured credit lines were determined solely on the basis of the credit rating "cap." According to ComEd, this means the calculation of TNW was not used for any purpose. Even if in future auctions there were one or a few suppliers for which the calculation was used, ComEd argues that the benefits of marginally increasing the accuracy of this calculation are small at best. (ComEd Reply Brief at 20-21)

3. Dynegy's Position

From the perspective of a supplier, Dynegy is concerned that (1) Staff's proposal will increase the work needed to complete the Part 1 Application, and (2) if problems arise, there may be little time (given the use of a narrow window for processing Part 1 Applications, as proposed by the Auction Manager) to resolve questions and issues that could arise. Dynegy believes that the Auction Manager's approach would seem to resolve these concerns and thus be unlikely to cause any prospective suppliers to fail to qualify due to problems with the TNW calculation and the short processing window. Dynegy recommends that the requirement to provide a TNW calculation should be rejected and either the status quo should be retained or the Auction Manager's optional approach should be adopted. (Dynegy Initial Brief at 7)

In its Reply Brief, Dynegy asserts that Staff does not acknowledge the time and manpower constraints imposed on prospective suppliers in complying with its proposal nor does Staff acknowledge that this can only, along with narrow application processing windows, have a negative impact on auction participation. (Dynegy Reply Brief at 4)

4. Commission Analysis and Conclusion

As the Commission understands it, an applicant or its guarantor must satisfy certain collateral requirements to participate in the Illinois Auction. Investment grade applicants are granted an unsecured credit limit which can be used to satisfy the collateral requirements. The unsecured credit limit equals the lesser of a percentage of TNW or a credit limit cap, both of which depend on the applicant's credit rating. In the 2006 Illinois Auction, the Auction credit and application team calculated each applicant's unsecured credit limit using financial statements and credit rating information provided in the Part 1 application. (Staff Ex. 2.0 at 3-4)

For the 2008 Auction, Staff proposes that each applicant be required to provide a calculation of TNW and include citations to supporting documentation. Such a submission was not required of applicants in 2006. Staff believes its proposal promotes more accurate TNW calculations by supplying a TNW calculation for comparison purposes from the entity with firsthand knowledge of the financial statements used to obtain data to perform the calculation.

As described in more detail below, the Auction Manager has offered an alternative proposal whereby the submission of a TNW calculation by each applicant, would be optional. ComEd supports the Auction Manager's proposal and opposes Staff's recommendation, arguing that it is burdensome and unnecessary. ComEd claims Staff's proposal would lead to applications from qualified applicants being treated as deficient, while providing only small benefits in terms of increased accuracy in the TNW calculation. Dynegy is concerned about the increased work for applicants and the limited time to resolve questions and issues during the application review process. Dynegy and ComEd complain that the proposal will have a negative impact on auction participation.

Having considered the arguments, the Commission first observes that preparation of a TNW calculation is potentially relevant in determining collateral requirements, and no party has proposed that the TNW calculation be eliminated. The Commission finds that preparation of an accurate TNW calculation should be part of the process for the 2008 Auction.

The Commission does not disagree with Staff's assertion that requiring the applicant to provide a TNW calculation could provide benefits in terms of calculation accuracy. On the other hand, requiring the applicant to do so would consume limited resources on the part of applicants. The Commission believes that an important concern here is to ensure that the Commission does not construct unwarranted barriers to applicants' participation in the 2008 Illinois Auction.

As explained above, in her rebuttal testimony the Auction Manager proposed an alternative to the Staff recommendation, whereby applicants would be given the option to provide the entity's TNW with supporting citations to their financial statements.

Staff believes that the Auction Manager's alternative proposal would not provide an incentive for applicants to voluntarily provide such a calculation. In the Commission's view, however, the Auction Manager's proposal will provide some incentive for applicants to provide a TNW calculation.

Under her proposal, if an applicant were to provide this information with all supporting citations, the applicant would be assured that its calculation would be considered by the credit and application team in coming to its own determination. If the credit and application team came to a different conclusion, the reason for the difference would be provided to the applicant. (AM Ex. 2.0 at 34-35)

As further explained by the Auction Manager, in the event an applicant did not provide a TNW calculation, the Auction Manager team will prepare the TNW calculation with references to financial statements, for submission to the credit and application team, thus allowing the credit and application team to work more efficiently. In this case, however, the applicant would not have the benefit of being provided with the credit and application team's calculation and would not have an opportunity to present its own calculation for consideration by the credit and application team. (AM Ex. 2.0 at 35)

Given the benefits to applicants associated with providing a TNW calculation, the Commission believes this process could encourage at least some applicants to expend the incremental effort needed to calculate TNW in exchange for the assurance that its calculations would be considered.

Furthermore, even if an applicant elects not to submit a TNW calculation, the credit and application team will still have the benefit of a TNW calculation and supporting references prepared by the Auction Manager team. The Commission believes the process is designed to result in an accurate calculation, while mitigating to some degree the expenditure of resources by the applicants and the credit and application team.

Upon consideration of all relevant factors as discussed above, the Commission finds that on balance, the Auction Manager's alternative proposal as set forth in AM Ex. 2.0 at 34-35 is reasonable and should be adopted for the 2008 Auction. This conclusion is without prejudice to reconsidering this issue for subsequent auctions.

B. Bilateral Credit Requirements

1. Dynegy's Position

Dynegy states that as currently structured, the SFCs permit the utilities to request collateral from suppliers but do not impose the reciprocal obligation on utilities. The utilities, Dynegy adds, are the parties with the obligation to pay under the SFCs. In Dynegy's view, this is akin to a homeowner receiving collateral from its bank but not having to provide any collateral (in the form of a mortgage on the home) to the bank. Dynegy argues that retail customers will pay more than if the industry standard approach of bilateral credit were adopted. Dynegy asserts that whatever the merits of looking only to the non-paying party for collateral may have been originally, they have evaporated with the decline of each of the utilities' financial positions to below investment grade. Dynegy urges the Commission to impose bilateral credit provisions. (Dynegy Initial Brief at 8-9)

According to Dynegy, no party appears to disagree that suppliers face a risk of non-payment under the SFCs due to the financial strength of the utilities and as such add a premium to account for utility credit risk when devising their bidding strategies (i.e., determining the price points at which they will withdraw some or all of their tranches from a given product). Dynegy claims no one can disagree that, since the first Auction, the situation has worsened as each of the utilities has gone from investment grade credit ratings to below investment grade credit ratings. The disagreement, Dynegy states, appears to center on two points -- first, whether there is quantitative analysis to show that retail customers will pay less if bilateral credit is imposed than if the status quo is maintained; and second, whether the utilities have less incentive to efficiently manage their costs than suppliers. (Dynegy Initial Brief at 9)

Quantitative analyses, Dynegy asserts, are not always easy to perform. Dynegy states that the utilities did not provide a quantitative analysis in the Procurement Dockets to support the current credit requirements and no party has been able to present such an analysis in this case. Dynegy states that until the Auction occurs, one cannot estimate the effect on auction clearing prices. On the other hand, Dynegy acknowledges there is a cost to utilities if they are required to post collateral under bilateral credit provisions. Dynegy states that on neither side of the equation do we have hard data. (Dynegy Initial Brief at 9-10)

On the risk premium side of the equation, Dynegy says there is evidence that the estimated implied premiums (for all risks and costs that were not individually discussed) added by suppliers likely were in the range of 7-68%. On the other side of the equation, Dynegy claims that even if one uses ComEd's inflated numbers, one gets a cost to the utilities of less than 2% of the Auction cost. (Dynegy Initial Brief at 10-11)

According to Dynegy, all else equal, if Auction prices were lower by just 2% (i.e., the embedded premiums of 7-68% were lower by just 2 percentage points) and if retail customers paid dollar-for-dollar the actual costs of the utilities' credit costs, retail customers in Illinois would be better off. Dynegy asserts that retail customers might do even better than that because, when the mark-to-market calculation is in the utilities' favor, they would have to post nothing. Under the status quo, Dynegy claims that regardless of the mark-to-market calculation and regardless of whether the utilities' credit ratings improve, retail customers will pay a premium on every kilowatt-hour consumed because suppliers cannot otherwise protect themselves from the credit risk posed by the utilities, other than by not participating in the Auction in the first place. (Dynegy Initial Brief at 11)

Dynegy says that rather than acknowledge this reality, ComEd falls back on its mantra of "This is how it's done in New Jersey." Dynegy asserts, however, that the situation faced by the New Jersey Board was not the same as the one presented here, nor has ComEd itself proposed various other protections imposed by the New Jersey Board.

First, Dynegy says the utility at issue in the New Jersey case was still investment grade while in the instant case all four utilities have sunk below investment grade. Second, Dynegy adds, even though the utility at issue remained above investment grade, the New Jersey Board was holding an expedited proceeding as a part of previously developed strategy to address potential deterioration in the credit ratings of utilities or their parent companies while here, ComEd has not proposed any such expedited process. Third, Dynegy asserts that even though the utility at issue was still investment grade, the New Jersey Board ordered the utility to "take preliminary steps to enable it to expeditiously put into place a trust/escrow structure" if necessitated by future developments. Dynegy states that ComEd has not proposed a trust/escrow arrangement to protect suppliers. (Dynegy Initial Brief at 11-12; Reply Brief at 7)

With respect to the second major area of disagreement, Dynegy agrees that under the status quo, suppliers have great incentive to attempt to manage their costs. Dynegy argues that suppliers, especially physical suppliers, as compared to financial parties, can do little to manage the credit risk posed by the status quo. Dynegy contends that Staff's implication that utilities have little incentive to efficiently manage their own risks because they are rate regulated is wrong precisely because the utilities are rate regulated. According to Dynegy, the power to disallow costs should, if Staff and other parties are analyzing the utilities' data carefully, provide utilities with powerful incentives to manage their costs efficiently and prudently. If they do not, Dynegy says the financial burden can and should fall to shareholders, not ratepayers.

To the extent the utilities include the cost of collateral in the retail prism costs charged to ratepayers, Dynegy says the already-established annual reconciliations offer the proper forum to examine those costs. According to Dynegy, if instead, some or all of the costs are included in base rates, then rate cases are the proper forum to examine those costs. In either case, if bilateral credit requirements are imposed and if the utilities do not manage the costs of those requirements properly, Dynegy avers the Commission can ensure that ratepayers will not bear the added costs – shareholders will. (Dynegy Initial Brief at 12-13) Dynegy adds that at the time of the 2006 Auction, every utility was investment grade. Dynegy asserts that the embedded premiums will go up given the intervening deterioration of all four utilities' credit standings. (Dynegy Reply Brief at 7)

In its Reply Brief, Dynegy argues that the real issue is that ComEd has better control over the risk and thus it should bear the risk, resulting in (all else equal) reduced prices for consumers. Dynegy asserts that ComEd's cost estimate, in the range of $67-$135 million annually, is based on a collateral amount that is $1 billion more than the amount required under the under the SFCs as calculated by ComEd itself. Dynegy argues that even using ComEd's inflated price tag, the cost of consumers is only a fraction of the premiums embedded into every kilowatt-hour consumers pay for and thus, a reduction in the auction premiums of as little as 1.9% would more than offset the cost posited by ComEd. (Dynegy Reply Brief at 5-6)

Dynegy asserts that the fundamental problem with ComEd's assertion that suppliers can more efficiently manage risk than utilities is that ComEd, and not suppliers, has a direct and substantial control over its financial position. Dynegy alleges that all of the other sub-points ComEd raises are meaningless analytically until it can explain how suppliers have more control than ComEd. According to Dynegy, just as a bank demands collateral for a home loan (because it is, after all, the borrower that has control over his/her financial wherewithal and not the bank), ComEd should post collateral because it is ComEd (and not suppliers) that has control over its financial wherewithal. (Dynegy Reply Brief at 6)

Dynegy disputes ComEd's assertion that it has provided tangible assurances. According to Dynegy, an opinion of counsel with no privity of contract to suppliers offers scant assurance, much less anything tangible, to suppliers. Dynegy says dollars in the form of collateral would offer such tangible assurance. Dynegy suggests that is why ComEd insisted on collateral from suppliers and not an opinion of counsel. Dynegy also asserts there is no guarantee that ComEd will not end up in bankruptcy or unable to pay suppliers in a timely manner. (Dynegy Reply Brief at 7)

According to Dynegy, ComEd's agreement to pay on a weekly basis in no way undercuts the need for bilateral credit. (Dynegy Reply Brief at 8)

With respect to Ameren's arguments on the need for a quantitative analysis, Dynegy maintains that such an analysis would be difficult, if not impossible, to provide. (Dynegy Reply Brief at 8)

Dynegy says that Staff uses a 5% value for the cost trade-off for when ratepayers are better off with bilateral credit than with the status quo. Dynegy suggests the number is more like 1.9%. Dynegy argues that so long as the embedded premium is reduced by a fraction of the amount estimated by Staff itself in its Public Report, then bilateral credit will prove less costly to retail consumers than the status quo. Dynegy states that absent from Staff's list of advantages of bilateral credit agreements is the advantage of attracting more prospective suppliers. (Dynegy Reply Brief at 8-9)

Dynegy also disputes Staff's claim that imposing bilateral credit could negatively impact the utilities' ability to maintain their service quality. (Dynegy Reply Brief at 9-10)

2. EMMT/Midwest Gen's Position

Midwest Gen supports the proposal of Dynegy to include bilateral credit requirement in the SFC's as a way to spread the risk and, consequently, lower the price of auction products. Citing Dynegy testimony, Midwest Gen says risk is a considerable component of the auction price, which suppliers include in pricing their bids to retail customers. Midwest Gen says the Commission should use this opportunity to help retail customers obtain a lower overall price by including a bilateral credit requirement in the SFC's. (EMMT/Midwest Gen Initial Brief at 12-14; Reply Brief at 11-12)

3. ComEd's Position

According to ComEd, customer rates will likely be higher if reciprocal credit requirements are imposed because the estimated cost to consumers of such a requirement is $67 to $135 million annually. ComEd states that while there is no evidence as to the amount that suppliers may include in their bids to cover the costs associated with managing the risks allocated to them if reciprocal credit requirements are not imposed, there is evidence that the suppliers are more efficient at managing this risk than ComEd is, and in the absence of reciprocal credit requirements, suppliers will compete in the auction to manage this risk at the lowest cost. ComEd also asserts that the industry standard with respect to default service solicitations is not to impose reciprocal credit requirements, and application of this standard has resulted in many successful solicitations. (ComEd Initial Brief at 28)

ComEd states that while the threat of a rate freeze and of credit downgrades were well known to suppliers prior to the start of 2006 Illinois auction, the auction was competitive and a success without the need for reciprocal credit. Furthermore, ComEd argues that as a regulated utility, it provides tangible assurances to its default service suppliers that eliminate the need for reciprocal credit requirements, such as its regulators' responsibility to ensure that ComEd is able to recover its prudently incurred costs, and its obligation to deliver electricity, which prohibits it from liquidating its business and disappearing as a functional matter. ComEd says it has already agreed to provide new assurances to suppliers in the form of an accelerated payments provision that provides for weekly instead of twice monthly payment of bills in the event that ComEd is downgraded below the minimum rating. (ComEd Initial Brief at 28)

If reciprocal credit requirements are imposed, ComEd says it will need to arrange an unsecured letter of credit facility in an amount sufficient to satisfy the credit requirements within a short period of time. ComEd states that under the terms of the SFCs, when a margin call is made by noon of a given business day, the party that is called upon has only until the close of the next business day to post cash or the end of the second business day to provide a letter of credit. As a result, ComEd claims a letter of credit facility would be needed to have the financing in place should large margin calls be required due to changes in market prices. (ComEd Initial Brief at 29)

According to ComEd, the exact size of the facility would involve judgment. ComEd states that there are several approaches that can be used to analyze the issue, each of which suggests that a significant facility could well be required. The actual amount required, ComEd says, would depend upon downward market price movements after the auction closed and would be unpredictable. ComEd estimates that the collateral amount that would have been required of ComEd as of January 19, 2007 under the existing SFCs had reciprocal credit requirements been imposed in the existing SFCs is nearly $1.5 billion. ComEd asserts that there was no guarantee then, and there will be no guaranty in the future, that prices would not move further from the auction price, thus necessitating greater amounts of collateral. ComEd contends that something in excess of $1.5 billion would need to be in place to ensure that ComEd could provide adequate and timely collateral in conformance with the SFC's requirements. (ComEd Initial Brief at 29-30; Reply Brief at 23-24)

Another measure of an appropriate size of the facility, ComEd avers, would use Standard and Poor's "Market and Credit Event Liquidity Assessment" or "MCELA," a tool which evaluates liquidity of companies. ComEd says the purpose of this dynamic test is to show at any point in time how much liquidity, i.e. access to capital, a company needs to withstand a stressed scenario. The stressed scenario is defined as the required liquidity if there is an unfavorable market prices movement of 15% in the first year and 20% thereafter and the company is downgraded below investment grade. Using the MCLEA approach, ComEd claims, would result in a recommended credit facility of $2.5 billion in order for ComEd to have a MCLEA slightly greater than 1.0 under a zero mark to market (i.e. at the time of the auction). (ComEd Initial Brief at 30)

ComEd says it initially considered its ability to use a secured credit facility, however, that proved not to be a realistic option given the size of the facility required, the limited availability of collateral and the need to preserve ComEd's secured borrowing capacity for the capital-intensive requirements of its business. ComEd says it does not have collateral available to secure the additional facility that would be necessary to satisfy a reciprocal credit requirement. ComEd further asserts that even if the required credit facility could be secured, it would severely limit the ability of ComEd to finance the maintenance and improvement of its delivery system going forward. (ComEd Initial Brief at 30-31)

ComEd believes that a likely approach would be to use a synthetic letter of credit structure under which ComEd would issue 3-year floating rate notes, the proceeds of which would go to a special purpose vehicle that would issue the necessary letter of credit. This special purpose facility, ComEd says, would be used to issue the letter of credit and would not be used for any other purpose. ComEd sought indicative pricing quotes from three investment banking firms to assess the probable costs of arranging such a facility. ComEd estimates the cost as ranging between $50 million and $125 million per year, for a $2.5 billion letter of credit facility. In addition, ComEd says it would need to pay upfront fees for new money financing authority, which costs 24 basis points or $6 million and an underwriting fee of 1% or $25 million. ComEd also says the issuer of letters of credit would assess a fee, which would be in the range of 12 ½ basis points or more, based on the amount of letters of credit actually issued. According to ComEd, the result is an annual cost of between $67 and $135 million, which ComEd says it would be entitled to pass onto retail customers. (ComEd Initial Brief at 31)

Due to the size of the credit facility needed, ComEd believes its ability to acquire debt at reasonable interest rates for other purposes would be impaired. ComEd claims that when lenders consider lending money to a company such as ComEd, they examine the company's cash flows, the current level of debt outstanding and all other credit obligations. The less favorable the resultant financial ratios appear, ComEd states, the more they will charge in interest costs, if they agree to extend credit at all. ComEd argues that credit rating agencies also take into account similar considerations when determining a company's credit rating. In ComEd's view, it is quite possible that the imposition of a reciprocal credit requirement could cause additional credit rating downgrades, which would increase the overall cost of new debt. ComEd believes an additional effect of an imposition of reciprocal credit requirements would be costs to customers to cover increased future financing costs. (ComEd Initial Brief at 31-32)

It is ComEd's position that there is no substantive evidence as to the amount that suppliers may include in their bids to cover the costs associated with the risks allocated to them if reciprocal credit requirements are not imposed. ComEd says Dynegy did not present any evidence or reasoning why a regulated utility might be better able to more efficiently manage this risk, which it would be forced to do if reciprocal credit requirements are imposed. (ComEd Initial Brief at 33)

ComEd argues that the decision whether or not to impose reciprocal credit requirements does not affect the overall amount of risk that must be managed; rather, it determines the allocation of that risk between ComEd and suppliers. Ultimately, whether or not reciprocal credit requirements are imposed, ComEd says the costs associated with managing the associated risk will be passed on to customers in one form or another. In ComEd's view, the key question is whether ComEd or the suppliers are better able to manage this risk and thereby reduce the costs that are ultimately borne by customers. (ComEd Initial Brief at 33)

According to ComEd, there are five reasons why suppliers are able to manage this risk more efficiently. First, in the absence of reciprocal credit requirements, suppliers will be forced to compete with each other to manage this risk at the lowest cost. ComEd asserts this is analogous to the treatment of the other costs and risks associated with the full-requirements service, whereby each bidder in the fixed-price full requirements auction makes its own judgments about how best to supply ComEd's default service load and manage the associated risks, and the bidders compete on the basis of who can do this at the lowest cost. The supplier with the best risk management strategy, ComEd claims will have an advantage in the auction. (ComEd Initial Brief at 34)

Second, a regulated utility such as ComEd cannot respond as quickly and with as much flexibility as suppliers can to various opportunities to manage the risk. ComEd argues that if it is forced to manage the risk – even assuming that it has sufficient credit capacity to meet the collateral requirements – financing authority must be approved by the Commission through a Section 6-102 filing and depending upon the specific circumstances, a "long form filing" would likely be required. ComEd asserts such a filing may take several months from start to finish. As a regulated utility, ComEd says it does not generally have the authority to use the available tools or techniques typically employed by other non-regulated companies to manage the risk (e.g., purchasing options etc.). Finally, given these limitations, ComEd says it may need to obtain the financing for collateral requirements in large, suboptimal amounts. ComEd argues that in contrast, suppliers likely would be able to respond more efficiently to changes in market conditions. ComEd says many of the suppliers have entire departments whose sole function is to manage these types of risks. (ComEd Initial Brief at 34)

Third, suppliers have a great deal of expertise in managing the risks allocated to them in the absence of reciprocal credit requirements. ComEd states that of the 14 winning fixed-price default service suppliers to ComEd, 11 also won fixed-price default service supply contracts in previous New Jersey fixed-price Basic Generation Service auctions and/or the Maryland Standard Offer Service Requests for Proposals ("RFPs"). According to ComEd, since the New Jersey auctions and Maryland RFPs do not include reciprocal credit requirements, ComEd default service suppliers have considerable experience in managing the risks allocated to them in the absence of reciprocal credit requirements. ComEd says that it is not in the supply risk management business and maintains only minimal active trading capability in the energy or derivative markets. ComEd also asserts that the banks with which ComEd would contract to address the risk would likely charge more than the costs suppliers would incur because suppliers would be concerned only with the mark to market risk in situations in which a utility failed to make payment. ComEd contends that banks, on the other hand, would assess costs to cover the full amount of the principal at risk to them. (ComEd Initial Brief at 34-35)

Fourth, through their bid quantities, suppliers are able to determine the level of risk that they are most comfortable managing by electing the number of tranches they choose to compete for within the auction. ComEd asserts that by contrast, if reciprocal credit requirements were imposed, it would be forced to manage the risks associated with the entire default service supply quantity, whether or not it can manage this amount efficiently. According to ComEd, by not imposing reciprocal credit requirements, the risk is allocated in smaller amounts to several suppliers based on their perceptions of, appetite for, and ability to assume such risks. ComEd claims this makes the sum of the smaller risks easier to manage compared to a situation in which ComEd alone manages this entire risk. (ComEd Initial Brief at 35)

Fifth, suppliers have the flexibility to allocate this risk to others by assigning their contracts to another qualified party. ComEd says it cannot assign its obligation to any other entity. It is bound by statute to meet the supply needs of all customers within its service territory who do not choose to be served by an ARES. (ComEd Initial Brief at 35-36)

According to ComEd, the industry standard with regard to utility default service supply solicitations is not to include reciprocal credit requirements. ComEd says that competitive solicitations for default service supply in New Jersey, the District of Columbia, Maryland, Pennsylvania, and other states have not included reciprocal credit requirements, and the results of these solicitations were successful as they were accepted by all of the applicable regulatory bodies. (ComEd Initial Brief at 36)

ComEd contends that while it is probable suppliers considered their risks due to the absence of reciprocal credit requirements when they decided their level of participation and their bid strategy, the high level of participation and the overall success of the 2006 Illinois Auction indicate that the absence of reciprocal credit requirements did not have a significant effect on participation and competition in the auction. ComEd says the absence of reciprocal credit requirements did not seem to affect Dynegy's decision to participate heavily in the auctions. (ComEd Initial Brief at 40-41)

According to ComEd, market participants are aware that ComEd has an obligation to provide electric utility service to its Illinois retail customers. They also understand, ComEd asserts, that it is required to provide that service under tariffs that are regulated by the Commission. ComEd claims market participants also understand that, unlike unregulated businesses, utilities like ComEd have a right to cost recovery and that rates cannot properly be set in a manner that deprives the utility of the opportunity to recover its reasonable and prudent cost of serving customers. (ComEd Initial Brief at 42)

ComEd claims its obligation to serve provides two assurances to suppliers. First, the regulators' responsibility to ensure that ComEd is able to recover its prudently incurred costs represents a tangible assurance regarding ComEd's financial future and its ability to honor its obligations. ComEd contends that while there have been serious efforts by some in an attempt to breach this obligation, the obligation remains. Second, ComEd says its obligation to deliver electricity prohibits it from liquidating its business and disappearing as a functional matter. Regardless of what happens to ComEd, financially or legally, the energy will be needed and a utility or other agency will be required to buy it in order to “keep the lights on.” According to ComEd, this provides added assurances to suppliers that they will be paid. (ComEd Initial Brief at 42)

ComEd states that the Commission initiated this proceeding pursuant to Section 9-250 of the Act to determine whether Rider CPP was in any way unjust or unreasonable and whether any changes should be made to that tariff. The Commission, ComEd says, emphasized that it was not inviting wholesale relitigation of issues that it disposed of in the original procurement dockets, rather, the Commission would consider changes to address facts or circumstances that were new or different from those considered in the procurement dockets. (ComEd Initial Brief at 44)

According to ComEd, the only circumstance that Dynegy points to that it alleges has changed since the 2006 auction are the credit rating downgrades of the utilities by the rating agencies as a result of the proposed legislation to freeze the utilities’ rates. ComEd argues that this occurrence was hardly new or unexpected as of the time of the 2006 auction. In ComEd’s view, the actual credit downgrades that followed the auction were anticlimactic and not unexpected. ComEd asserts that Dynegy has failed to demonstrate any material change in circumstances warranting revising the auction process. (ComEd Initial Brief at 44)

In its Reply Brief, ComEd says Dynegy points to the implied risk premiums embedded in the auction prices that Staff discusses in its Post-Auction Public Report. According to ComEd, Dynegy argues that the bulk of these premiums are due to the credit risk that suppliers face. ComEd asserts that this risk premium derives from seven different risks suppliers face, and the amount associated with any individual risk is unknown, as no witness attempted to quantify that amount. (ComEd Reply Brief at 23)

Dynegy also argues that the $2.5 billion credit facility that ComEd used to obtain the cost of reciprocal credit is larger than it needs to be. According to ComEd, aside from the fact that a smaller facility would be no more beneficial to customers, Dynegy’s argument is not true. ComEd maintains that it must obtain regulatory approval to procure a credit facility and this process takes many months. ComEd asserts, however, that it has only one or two business days to provide credit support when requested by the suppliers, or else be in default under the agreements. Thus, ComEd says it must be sure that it has a sufficiently sized credit facility in place at all times. (ComEd Reply Brief at 23)

According to ComEd, Dynegy argues that ComEd cannot rely upon the New Jersey decisions that have not required reciprocal credit because Illinois has not implemented the New Jersey credit rules. ComEd asserts that it has, however, gone beyond what New Jersey requires. ComEd says New Jersey only required its utilities to implement bi-monthly billing when the utility fell below investment grade while ComEd is proposing to implement weekly billing if it falls below investment grade. This action, ComEd maintains, will significantly reduce the risk faced by suppliers in Illinois. (ComEd Reply Brief at 24)

4. Ameren's Position

Ameren disagrees with Dynegy's proposal adopting bilateral credit provisions. Ameren says that while a risk premium may be present within auction clearing prices in the event that the utilities are not required to post collateral, it is not clear that any such risk premium would be larger than the cost to the utilities and ratepayers of posting collateral. Ameren asserts that Dynegy provides no conclusive evidence that demonstrates that bilateral credit provisions would: (1) be relatively inexpensive for ComEd or Ameren to bear compared to suppliers; or (2) be the lower cost alternative. (Ameren Initial Brief at 41)

Ameren agrees with Staff that the proposal to make the collateral requirements bilateral would likely cause ComEd and Ameren to incur costs in connection with posting collateral, which could be passed onto Illinois ratepayers. Ameren also asserts that the direct cost in connection with adopting bilateral credit provisions might exceed any reduction in the contract risk premium, which would harm Illinois ratepayers. Ameren suggests the impact that a proposal to adopt bilateral credit provisions would have on risk premiums in auction clearing rates has not been quantified. Ameren also agrees with Staff that quantitative analysis of any proposal to adopt bilateral credit provisions demonstrating the benefits that will accrue to ratepayers will exceed any costs is imperative in order to recommend approval of those proposals for use in the next Illinois Auction. (Ameren Initial Brief at 41-42)

Ameren argues that the posting of collateral by utilities under the SFCs would drive one component of total costs upward for the utilities and ratepayers. Ameren asserts that Dynegy is unable to demonstrate that reductions in risk premiums built into auction bidding would match or exceed the incremental cost to the utilities of posting collateral. (Ameren Initial Brief at 42)

In its Reply Brief, Ameren says it agrees, generally, with Staff's rationale prompting withdrawal of its rebuttal provisional recommendation for modified bilateral credit requirements. Ameren agrees with Staff's conclusion that, based on the record facts, Staff cannot conclude that bilateral credit requirements are the lower cost alternative for ratepayers. Ameren maintains that the record does not support Dynegy's assumption that adding bilateral credit requirements to the SFCs will result in lower costs to ratepayers. (Ameren Reply Brief at 15)

5. Staff's Position

Staff states that bilateral credit requirements would reduce the level of risk suppliers face, which should reduce the level of any risk premium that may be reflected in the Illinois Auction price (the "contract risk premium"), to the benefit of Illinois ratepayers. Nevertheless, Staff says the utilities would incur costs in connection with posting collateral, which would be passed onto Illinois ratepayers. According to Staff, Illinois ratepayers would be harmed if the cost associated with this proposal exceeds any reduction in the contract risk premium. Staff believes that quantitative analysis demonstrating the benefits that will accrue to ratepayers will exceed any costs or risks associated with bilateral credit requirements is imperative in order to recommend approval of this proposal for future auctions. (Staff Initial Brief at 37)

Dynegy proposes modifying the SFCs to require the utilities to post collateral under the same terms applicable to suppliers under the current SFCs. Staff asserts, however, that Dynegy never estimated the contract risk premium associated with utility credit risk. Rather, Dynegy witness Huddleston testified that Dynegy's risk premium calculation is not so "scientific" as to distinguish individual premiums for each component of the total contract risk premium. (Staff Initial Brief at 38, citing Tr. 250-251) According to Staff, Mr. Huddleston stated that "it is very difficult in the abstract to say definitely" whether adopting bilateral credit requirements would be the lower cost alternative for ratepayers in light of the utilities' cost estimates for posting collateral under the SFCs. (Id., citing Tr. 240-244)

According to Staff, the amount of credit risk and regulatory risk facing the utilities has increased since the 2006 auction, which may warrant reallocating credit risk between suppliers and the utilities. Specifically, Staff states that on March 12, 2007, Moody's Investor's Service ("Moody's") downgraded the Ameren Illinois Utilities' issuer credit ratings to Ba1, which is one notch below the lowest available investment grade credit rating. Similarly, Moody's downgraded ComEd's senior unsecured and issuer credit ratings to Ba1. Currently, the utilities' issuer ratings from Fitch Ratings are below investment grade and ComEd's Standard & Poor's ("S&P") unsecured credit rating is below investment grade. (Staff Initial Brief at 38-39)

Staff argues that utility credit risk should be allocated to the party that can manage it most efficiently because unlike utilities and suppliers, Illinois ratepayers pay the price for utility credit risk regardless of its allocation between utilities and suppliers. Staff believes, however, that identifying which party is more efficient at managing default risk (i.e., risk of nonpayment) is not trivial. According to Staff, while utilities have more control over their risks than suppliers, as rate-regulated entities, utilities have less incentive to efficiently manage their costs than suppliers. (Staff Initial Brief at 39)

Because of the latter consideration, Staff generally prefers that suppliers manage risk rather than the utilities. Nevertheless, Staff recognizes that default risk could become too high for some suppliers to manage efficiently. Thus, in rebuttal testimony, Staff witness Phipps provisionally recommended imposing collateral requirements on a utility if its "Minimum Rating" (as defined in Section 6.4 of the SFCs) falls below investment grade (i.e., BBB from S&P, Baa3 from Moody's and BBB from Fitch Ratings). (Staff Initial Brief at 39-40)

Staff's proposal differs from Dynegy's proposal and the SFC collateral requirements for suppliers because it would require the utilities to post collateral only when they do not satisfy the Minimum Rating requirement outlined in Section 6.4 of the SFCs. According to Staff, this modified approach to bilateral credit requirements would reduce suppliers' exposure to utility default risk, which should ultimately be reflected in the final 2008 auction price, but would not require the utilities to post collateral during periods when suppliers' exposure to utility default risk should be low enough for suppliers to manage efficiently. (Staff Initial Brief at 40)

Staff says Ameren's annual cost estimate for posting collateral under the SFCs was substantially less than ComEd's estimate due to the size of the credit facility and the higher price for ComEd's proposed unsecured facility in comparison to Ameren's secured facility. Staff indicates that ComEd estimates the annual cost would range from $50 to $125 million, plus approximately $30 million in upfront fees. ComEd's annual cost estimate for a $2.5 billion credit facility would be less than 5% of the $3.5 billion that ComEd expects to pay suppliers under its auction contracts this year.

Staff states, however, that no party to this proceeding has quantified the price for utility credit risk or the proportion of utility credit risk relative to the entire contract risk premium. As such, Staff says a comparison of ComEd's collateral costs relative to its supply costs does not reveal the impact that bilateral credit requirements would have on ratepayers; rather, it only suggests that if the auction clearing price does not fall by at least 5%, then requiring the utilities to post collateral might increase ratepayers' energy costs. (Staff Initial Brief at 40-41)

In its Initial Brief, Staff withdrew its provisional recommendation for modified bilateral credit requirements because its says the record on whether potential benefits that might accrue to ratepayers in connection with Staff's modified bilateral credit proposal outweigh the costs that ratepayers would certainly incur under this proposal remains ambiguous. Staff states that utilities have more control over their credit risk than suppliers, which, in isolation, might make utilities' management of that credit risk more efficient than suppliers. Staff adds that the regulatory process imposes costs on utilities that reduce that efficiency. Consequently, Staff cannot conclude that bilateral credit requirements are the lower cost alternative for ratepayers.

Staff is particularly concerned about the potential for bilateral credit requirements – whether modified as Staff initially proposed or otherwise – to further constrain utilities' liquidity, which in turn, could limit their ability to maintain service quality. With the measurement of the net benefit to ratepayers of a bilateral credit requirement so elusive and the potential negative impact collateral requirements could have on utilities' ability to maintain service quality undeniable, Staff recommends that no bilateral credit requirement be added to the SFCs for the 2008 auction. (Staff Initial Brief at 42-43)

According to Staff, no witnesses testified that the portion of the risk premium included in the auction clearing price relating to utility credit risk is either "considerable" or greater than the price the utilities – and ultimately ratepayers – would pay if the utilities were required to post collateral. Staff states that nevertheless, Dynegy and Midwest Gen/EMMT equate including bilateral credit requirements in the SFCs to lowering the overall price to ratepayers. (Staff Reply Brief at 27)

Staff says both Midwest Gen/EMMT and Dynegy argue that retail customers will pay more under the current SFC credit requirements than if bilateral credit requirements were adopted because they assume utilities can manage risk more efficiently than suppliers. According to Staff, Midwest Gen/EMMT assert that bearing risk is relatively inexpensive for the utilities and Dynegy argues further that if utilities do not justify their costs as prudent in the context of either an annual reconciliation proceeding or a rate case, then shareholders – not ratepayers – should incur those costs. Although Staff agrees with Dynegy that the Commission should not compensate utilities for imprudent costs, Staff asserts utilities would incur regulatory costs, such as financing fees, rate case and reconciliation administrative and legal costs regardless of whether the Commission deems a utility's costs prudent. Staff states that as unregulated entities, suppliers do not incur those costs.

Staff notes that even if the mark to market calculation is in the utilities' favor and they are not required to post collateral under the SFCs, they would still incur costs to have available a credit facility in case the mark to market calculation would move in the opposite direction. Staff says that assuming such costs are deemed to be prudently incurred, they would be passed through to ratepayers even though the utilities would not be required to post collateral. Staff believes that Midwest Gen/EMMT's and Dynegy's arguments regarding the ability of utilities to manage risk more efficiently than suppliers are not convincing. (Staff Reply Brief at 27-28)

Staff says the Commission previously rejected arguments based on industry standard contract terms in the initial Ameren procurement proceeding. Specifically, the Commission's Order stated, "[b]ecause the contracts at issue are not the result of arms length negotiations, the Commission does not believe it is appropriate to compare the provisions of such contracts to competitive contracts." (Staff Reply Brief at 28-29, citing Docket 05 0160/0161/0162 (Cons.), January 24, 2006, Order 171)

Staff argues that as suppliers, Dynegy and Midwest Gen/EMMT are primarily concerned with reducing the amount of risk that suppliers bear in comparison to utilities. However, from Staff's perspective, the crux of the bilateral credit issue relates to its net impact on ratepayers. Staff asserts that no party presented an analysis that shows definitively ratepayers would pay less if bilateral credit requirements were adopted for the next auction. Staff claims the only analyses presented on this issue show that if the utilities were required to post collateral under the SFCs, ratepayers would incur costs that they do not incur under the existing SFCs. Thus, Staff opposes bilateral credit requirements and recommends that no bilateral credit requirement be added to the SFCs for the 2008 auction. (Staff Reply Brief at 29)

6. AG's Position

The AG says it takes no position on Dynegy's recommendation to adopt a bilateral credit requirement. However, if the Commission were to adopt Dynegy's recommendation, the AG believes there should be restrictions on any associated costs that could be recovered from ratepayers. The AG says that the costs associated with complying with bilateral credit requirements would be relatively higher for utilities with relatively lower credit ratings. The AG argues that such costs should not be recovered from ratepayers unless a utility can demonstrate that the decline in credit rating was beyond its control. The AG claims this safeguard is necessary to ensure that the utility or its parent does nothing to impair its investment grade. (AG Reply Brief at 3)

7. Commission Analysis and Conclusions

Dynegy complains that as currently structured, the SFCs permit the utilities to request collateral from suppliers but do not impose reciprocal obligation on utilities. Dynegy wants the Commission to adopt bilateral credit requirements, and its proposal is supported by EMMT/Midwest Gen. They suggest, among other things, that if bilateral credit requirements were adopted, ratepayers would benefit from the decrease in risk on the suppliers.

ComEd, Ameren, and Staff oppose bilateral credit requirements. They claim that the record does not support a finding that bilateral credit requirements would reduce costs to ratepayers. They believe bilateral credit agreements might instead increase costs to ratepayers, and the new requirement would adversely affect the already weakened financial condition of the utilities. Both the proponents and opponents of adopting bilateral credit requirements seem to agree that the most material change in circumstances since this same proposal was rejected in Dockets 05-0160/05-0161/05-0162 (Cons.) is that the certain credit ratings of all the utilities has declined from investment grade to below investment grade.

The Commission certainly understands the perspective and concerns of Dynegy and EMMT/Midwest Gen, and their arguments are well explained. The Commission however, must take a broad and balanced view of issues and concerns. While the Commission agrees with Dynegy that the utilities have some direct control over their financial positions, the Commission believes that to some extent, factors outside the control of the utilities are currently influencing their financial positions. The Commission is concerned with the financial condition of Illinois electric utilities and ensuring that utility customers continue to receive safe and reliable electric service.

The evidence is clear that imposing bilateral credit agreements on the utilities would impose costs on them and would have an adverse impact on their already weakened financial conditions. Further, the record does not establish that the overall cost to ratepayers would be lowered if bilateral credit agreements were mandated. All things considered, it would not be in the public interest to impose bilateral credit requirements on ComEd and Ameren at this point in time. In conclusion, Dynegy's proposal will not be adopted.

C. Changes to Accommodate Agency Arrangements

One of the Auction Manager's proposed changes to the application process is to establish requirements for prospective suppliers that choose to participate in the Illinois

Auction through the use of an agent under an agency arrangement. (AM Ex. 1.0 at 18-19; AM Ex. 1.3; Tr. 464-465) Dr. LaCasse testified that specifying the requirements for a prospective supplier that participates in the Illinois Auction through an agent under an agency arrangement would eliminate any uncertainty regarding how the auction requirements apply to such suppliers and would serve to increase participation and competition in the auction process. (AM Ex. 1.0 at 20; Tr. 465-466)

1. ComEd's Position

ComEd supports the recommendation of Dr. LaCasse. Under her proposal, the applicant will be required to provide a copy of the agency agreement and assurances that the agency agreement will remain in place until the time the SFC is executed should the applicant become a winning bidder. This will verify that the applicant has the ability to bind the principal to execute the contract. According to ComEd, it fulfills the same requirement that other prospective suppliers (acting directly without use of an agent) meet by certifying that any bid they submit is a binding offer under the terms of the SFC. (ComEd Initial Brief at 26-27)

ComEd agrees with Dr. LaCasse that clarifying how the application requirements apply to suppliers using agents confirms for them that such participation is possible and provides advance notice of the documents they will be required to provide. ComEd claims this can only increase participation and competition in the auction process. According to ComEd, it will further the goals of the auction process, including obtaining reliable supply at competitive market prices and promoting the participation of all market participants on a fair and equal basis. (ComEd Initial Brief at 27)

ComEd indicates that at the hearing, Dr. LaCasse agreed with certain suggestions from Staff to modify the form attached to her testimony as Auction Manager Exhibit 1.3. ComEd supports those revisions, set forth on Staff Cross Exhibit 8. Similarly, ComEd supports the inclusion of parenthetical language following the first check box on Auction Manager Exhibit 1.4 to indicate that it is not for use in an agency arrangement situation. (ComEd Initial Brief at 27 and Reply Brief at 21 citing Tr. 482)

2. Ameren's Position

Ameren agrees with Auction Manager Dr. LaCasse's proposal. Ameren states that in the context of the auction, an agency agreement is a legal relationship whereby one party (the agent) can in defined circumstances act on behalf of another party (the principal). (Ameren Initial Brief at 39)

According to Ameren, while in the usual circumstance the creditworthiness of the applicant or its guarantor is evaluated in the Part 1 Application, for an applicant that acts as agent, the creditworthiness of the principal (or the principal's guarantor) is evaluated in the Part 1 Application since it is the principal that would ultimately have legal responsibility for the contract. Ameren adds that all requirements of the application process are the same for all prospective suppliers, but the documents that are provided to fulfill these requirements may be different for prospective suppliers applying under an agency agreement. (Ameren Initial Brief at 39-40)

Dr. LaCasse proposes that the applicant be required to provide a copy of the agency agreement and assurances that the agency agreement will remain in place until the time at which the SFC is executed should the applicant win at the auction. Ameren says these documents provide the assurance that the applicant has the ability to bind the principal to execute the applicable SFC if the applicant becomes a winning bidder at the auction. According to Ameren, this is to fulfill the same requirement that other prospective suppliers (prospective suppliers that do not apply under an agency agreement) fulfill by certifying that any bid they submit is a binding offer under the terms of the SFC. (Ameren Initial Brief at 40)

In Ameren's view, this recommendation works to fulfill the goals of the auction process, including the goal of obtaining reliable supply at competitive market prices, and promoting the participation of all market participants on a fair and equal basis. Ameren believes that clarifying how the application requirements apply to prospective suppliers that qualify under an agency agreement in advance of the auction confirms for them that such participation is possible and provides advance notice of documents that these prospective suppliers may have to provide. Ameren contends that this can only increase participation and competition in the auction process. (Ameren Initial Brief at 40)

In its Reply Brief Ameren says it does not disagree with Staff's modification proposals contained in Staff's Initial Brief on this issue. (Ameren Reply Brief at 14, citing Staff Initial Brief at 28-37)

3. Staff's Position

While Staff agrees with the general proposition of the Auction Manager, Staff submits that the proposed Illinois Auction "requirements" for prospective suppliers participating pursuant to an agency arrangement do not appropriately minimize or eliminate certain additional risks to the utilities and their customers that arise from an entity's participation in the Illinois Auction through an agency arrangement. While Staff is cognizant of the goals and concerns that support the Auction Manager's proposal, Staff proposes certain modifications to the specific language proposed by the Auction Manager to minimize certain potential risks to the utilities and their customers. Staff also supports other minor language modifications to clarify certain aspects of the requirements proposed by the Auction Manager. (Staff Initial Brief at 28)

Staff's basic concern is that the utilities (and ultimately their customers) are exposed to unreasonable additional risks by not requiring or obtaining a certification from the principal in the Case 2 scenario. Staff says neither Ameren nor ComEd addressed this specific issue in their initial briefs, and Staff continues to recommend the language modifications described in its Initial Brief. (Staff Reply Brief at 26)

Dr. LaCasse testified that from a functional perspective, in the context of the auction, "an agency agreement is a legal relationship whereby one party (the agent) can in defined circumstances act on behalf of another party (the principal)." (AM Ex. 1.0, p. 18) Staff states that under Illinois law, "'[a]gency' is a consensual, fiduciary relationship between two legal entities created by law by which the principal has the right to control the conduct of the agent and the agent has the power to effect the legal relations of the principal." (I.L.P. Agency § 2) According to Staff, while agency agreements for potential suppliers may or may not be subject to and created under Illinois law, it will be useful to review certain aspects of Illinois law regarding agency to understand the issues that may arise when an agency is involved. (Staff Initial Brief at 29)

Staff argues that one of the risks associated with allowing prospective suppliers to participate pursuant to an agency agreement is the risk that the agency does not actually exist or, if it exists, is limited or restricted with respect to the scope of the agent's authority. Staff also contends that an agent's admission or certification to the existence of an agency is, in and of itself, ineffective to establish an agency since an agency must be proved by tracing it to some word or act of the principal.

The requirements for applicants applying under agency agreements proposed by the Auction Manager are set forth in Auction Manager Exhibit 1.3. Auction Manager Exhibit 1.3 sets forth requirements based on two cases or scenarios. The first case ("Case 1") controls the situation where the principal will execute the SFCs. The second case ("Case 2") controls the situation where the agent will sign the SFCs. The requirements for both cases set forth documents and information that must be provided to the Auction Manager. Staff states that in broad terms, applications for potential suppliers submitted by an agent pursuant to an agency agreement must identify the party or parties acting as Principal(s), provide a copy of the applicable agency agreement, and provide various certifications concerning the existence of the agency agreement. (Staff Initial Brief at 30)

Staff Cross Exhibit 9 is a comparison of the Case 1 and Case 2 language proposed by the Auction Manager in Auction Manager Exhibit 1.3, showing the differences between the Case 1 and Case 2 language in legislative style. According to Staff, one of the main differences between the Case 1 (SFC executed by principal) and Case 2 (SFC executed by agent) requirements is that in the Case 1 scenario the certifications must be provided by the principal and in the Case 2 scenario the certifications may be provided by the agent or the principal. Subject to some minor revisions to clarify the requirements proposed by the Auction Manager, Staff has no concerns or objections to the Case 1 scenario requirements. Staff does have concerns regarding the Case 2 requirements.

While Staff understands the reasons supporting the Auction Manager's proposal to allow certifications to be provided by the agent in the Case 2 scenario, concerns remain regarding the additional risk to the utilities and their customers in situations where certifications are provided only by the agent. According to Staff, Illinois agency law indicates that agent certifications or admissions will not be adequate in and of themselves to ensure that an agency exists if litigation over that issue later develops. While the requirement for a copy of the agency agreement itself would appear to be evidence that could establish the creation of the agency, Staff says the Auction Manager testified that she did not plan to review the content of agency agreement itself to make substantive determinations. Staff also contends that reliance on a copy of the agency agreement is much more likely to involve litigation than would reliance on a certification from the principal.

While the chance of mistake, misrepresentations or fraud may seem remote, Staff says the recent experience with Enron Corporation demonstrates that such concerns should not be ignored. Staff also notes that while the certifications and representations by the agent would presumably allow the utilities to pursue the agents in the event of some mistake or misrepresentation, there is nothing in the current auction requirements establishing or requiring that agents in and of themselves meet certain creditworthiness standards. Staff believes that the ability to pursue an agent is at best of uncertain value. For the foregoing reasons, Staff recommends that the Case 2 requirements allowing the certifications to be provided by the agent be modified. (Staff Initial Brief at 33-34; Staff Reply Brief at 26)

According to Staff, one means of modifying the Case 2 language is to simply delete the added language allowing the certification to be provided by the agent (applicant) so that Case 2 also requires the certifications to be provided by the principal. Staff states that while this may discourage some prospective suppliers that would participate pursuant to an agency agreement, this risk has to be weighed against the benefit of significantly reducing if not eliminating risks related to the existence and scope of the agency by obtaining a certification from the principal. Putting aside for the moment any concerns by the Auction Manager related to the difficulty of obtaining certifications where there are multiple entities acting as principal, Staff submits that the record does not demonstrate that providing a certification is so burdensome that it will discourage participation by prospective suppliers. Simply put, Staff cannot understand how requiring a single principal to execute a short certification is so burdensome that it will cause the prospective supplier to forego participation. (Staff Initial Brief at 34-35)

Staff is more sympathetic to the Auction Manager's concerns in situations where an agency involves multiple entities acting as principal. Staff states that practical considerations of dealing with multiple entities could add significant delay to obtaining proper execution of the certification(s) by the multiple entities acting as principal. To accommodate this practical concern, Staff would not object to allowing the certifications to be provided initially by the agent subject to a requirement that such certifications be provided by the principals prior to the execution of the SFCs. Allowing initial agent certifications for multiple-entity principals, Staff asserts, would eliminate initial burdens that could discourage participation by multiple-entity principals, while at the same time providing extra protection to the utilities and their customers prior to execution of the SFCs. Staff believes that delaying the date by which multiple-entity principals must provide the principal certifications would address the practical difficulties and extra time needed to obtain such certifications. (Staff Initial Brief at 35)

The next difference between the Case 1 and Case 2 requirements is the deletion of the first two bullet points (in paragraph number 3 in the Case 2 scenario) of the representations to be included in the certification. Staff does not believe that the second bullet point is related to the existence or scope of the agency, and therefore does not object to its deletion in the Case 2 scenario. Staff contends the same is not true of the first bullet point, which requires a representation that the principal is familiar with the agency agreement submitted by the agent. According to Staff, this seems to go to the heart of whether an agency agreement exists, and it seems to Staff that the principal must necessarily be familiar with the agency agreement if one in fact exists. Thus, Staff recommends that the first deleted bullet point remain in the Case 2 requirements. (Staff Initial Brief at 35-36)

The requirements proposed by the Auction Manager specify that an "officer's certificate" be provided under Case 1 and Case 2 for the certifications concerning the existence of the agency agreement. Staff says the Auction Manager testified on cross-examination that potential suppliers would not necessarily be corporations, and that the appropriate certification (e.g., officer's certificate) would vary with the type of entity involved.

According to Staff, Staff Cross Exhibit 8 contained proposed revisions to the Auction Manager's proposed language that deleted the reference to "officer's certificate" and replaced it with "A certificate from the Principal, executed by an officer, partner or similar official of the Principal." Staff Cross Exhibit 8 also proposed a requirement that the "certification" include a statement setting forth how the execution, delivery and performance of the agency agreement were authorized. Staff says the Auction Manager agreed to all of the revisions set forth in Staff Cross Exhibit 8 (Staff Initial Brief at 36, citing Tr. 470-471) and, subject to the other language modifications proposed by Staff, Staff submits that the revised language set forth in Staff Cross Exhibit 8 more fully sets forth the certification requirement and should be approved by the Commission.

The Auction Manager, Staff says, also confirmed that participation through an agency agreement does not change the entity to be relied upon for the creditworthiness examination. (Staff Initial Brief at 36-37, citing Tr. 482) That is, creditworthiness will be based on an examination of the principal or, if applicable, a guarantor, but not the agent. According to Staff, the Auction Manager confirmed that in submitting Subpart A.6 of the Part 1 Application under an agency agreement, the agent should check the "Guarantor" or "Principal" check boxes (to indicate the entity that will be fulfilling the financial and credit requirements) but not the "Applicant" check box. Staff says the Auction Manager also agreed that it would be helpful to add a parenthetical to the "Applicant" checkbox indicating "not to be used for Applicants applying under an agency arrangement." Staff recommends adding such clarifying language. (Staff Initial Brief at 36-37)

4. Commission Analysis and Conclusion

One of the Auction Manager's proposed changes to the application process is to establish requirements for prospective suppliers that choose to participate in the Illinois Auction through the use of an agent under an agency arrangement. While agreeing with the general proposition advanced by the Auction Manager, Staff offered various revisions to the Auction Manager's proposal.

The Commission observes that the positions of the parties, including Staff, are set forth in a clear, articulate manner. Those positions are summarized above and will not be repeated in this conclusion.

Having reviewed the record, the Commission agrees that the application process would be improved if requirements for principals who wish to participate in the Auction under an agency agreement were added.

It appears to the Commission that the manner in which to modify the application process to accommodate suppliers who choose to participate in the Auction under an agency agreement is no longer in dispute. Generally, the proposal of the Auction Manager was acceptable to the parties and, except as modified below, is approved.

Staff Cross Exhibit 8 contained revisions to the Auction Manager's proposed language that deleted the reference to "officer's certificate" and replaced it with "A certificate from the Principal, executed by an officer, partner or similar official of the Principal," and also proposed a requirement that the "certification" include a statement setting forth how the execution, delivery and performance of the agency agreement was authorized. Staff's language revisions are appropriate and are hereby approved.

The proposal by Staff to add a parenthetical to the "Applicant" checkbox indicating "not to be used for Applicants applying under an agency arrangement" to subpart A.6 of the Part 1 Application is also appropriate and is hereby approved. The Commission agrees with Staff and finds that the first bullet point in paragraph 3 for the Case 2 scenario of the representations to be included in the certification is necessary and should not be deleted.

Staff has also suggested modifying the Case 2 language to delete the added language allowing the certification to be by provided by the agent, in the event there is only a single entity acting as principal, and require the certifications to be provided by the single principal.

The Commission believes that such a change would not be overly burdensome so as discourage participation by prospective suppliers and finds that this proposal should be adopted. In the event there are multiple entities acting as principals, Staff suggests allowing the certifications to be provided initially by the agent subject to a requirement that such certifications be provided by the principals prior to the execution of the SFCs. Staff believes that allowing initial agent certifications for multiple-entity principals would eliminate initial burdens that could discourage participation by multiple-entity principals, while at the same time providing extra protection to the utilities and their customers prior to execution of the SFCs. The Commission finds that this proposal constitutes an effective, practical improvement to the procedure proposed by the Auction Manager and it is hereby approved.

D. Line of Credit Requirements for Guarantors

The SFCs limit ratepayers' exposure to risk of loss arising from a supplier default by limiting the amount of unsecured credit granted per supplier or per financial guaranty; however, the SFCs do not limit the amount of unsecured credit granted per guarantor. Staff asserts that if this deficiency in the credit requirements is not corrected, then the potential would exist for a single entity that provides financial guarantees to more than one supplier to circumvent the unsecured credit limits provided in the SFCs, which would reduce the amount of protection to ratepayers in the case of a supplier default. Staff recommends revising the first paragraph of Section 6.4(i)(b) of ComEd's and Ameren's SFCs as shown on Staff Ex. 2.0, pages 6-7.

In direct testimony, the utilities also proposed language to address this "loophole" that exists in the current SFC credit requirements. In rebuttal, ComEd agreed with Staff's proposed language whereas Ameren continued to recommend approval of its originally proposed language. Staff asserts that Ameren's proposal is less accurate than Staff's proposal for the following two reasons: (1) it is incorrectly included in a section of the SFCs that applies to suppliers not relying on guarantors to meet the SFC credit requirements; and (2) it is inconsistent with another sentence contained in Section 6.4(i)(b) of the SFCs that could be misconstrued to mean that the Credit Limit is applied on a guaranty basis rather than a guarantor basis. For those reasons, Staff opposes Ameren's proposed language and recommends approval of Staff witness Phipps' proposed revision to Section 6.4(i)(b) of the SFCs, which should increase the amount of protection to ratepayers in case of a supplier default by limiting the amount of unsecured credit granted per guarantor rather than per guaranty.

Ameren agrees with Ms. Phipps' view and recommends that the following sentence be inserted just prior to the final sentence within BGS-FP SFC Section 6.4(i)(a) as follows: "Similarly, a Guarantor will be granted a single Credit Limit to be applied to all BGS-FP Suppliers and BGS-LFP Suppliers whose payment obligations under BGS Supply agreements the Guarantor guarantees." Ameren asserts that this language would serve the same purpose as the language proposed by Ms. Phipps. ComEd supports Ameren's proposal. In its Reply Brief, Ameren says it does not disagree with the amendatory language proposed by Staff. (Ameren Reply Brief at 8, citing Staff Initial Brief at 8-9)

In its Reply Brief, Staff says Ameren proposed insufficient justification for its language. Staff says Ameren offered no argument that its proposal is in any manner superior to Staff's proposed language. In contrast, Staff says it has explained why its proposed language, which ComEd supports, is preferable to Ameren's flawed revision to Section 6.4 of the SFCs. Staff opposes Ameren's proposed language and recommends approval of its proposed revision to Section 6.4(i)(b) of the SFCs, which is intended to close the existing loophole that could allow a guarantor to receive double the amount of unsecured credit it should be granted under the SFCs. (Staff Reply Brief at 5-6)

Having reviewed the record, the Commission finds that the Staff recommendation should be adopted. As discussed above, the supplier forward contracts currently limit the amount of unsecured credit granted per supplier or per financial guaranty in order to limit ratepayers' exposure to risk arising from a supplier default; however, the SFCs do not currently limit the amount of unsecured credit per guarantor which could allow a single entity that provides guarantees to more than one supplier to bypass the unsecured credit limits.

The Commission agrees with Staff that this loophole exposes ratepayers to risk and should be closed. ComEd and Ameren concur, although Ameren proposes different language to which Staff objects. To the extent any disagreement still exists, the Commission finds that the language proposed by Staff is more accurate and should be included in the SFCs.

E. Uncontested Credit Issues

1. Acceptance of 2006 Auction Modifications

To streamline the application process for the next auction, Staff recommends that all modifications to the pre- and post-auction letters of credit that were accepted for the 2006 auction should also be accepted in the next auction so that only new revisions will be considered during the application process for the next auction. Staff also recommends that, where applicable, revisions to the letters of credit that are adopted in this auction improvement proceeding should supersede revisions that were found acceptable during the 2006 Illinois Auction application process. ComEd and Ameren agree with this recommendation, and no other party opposed it.

Having reviewed the record, the Commission believes Staff's recommendations are appropriate and they are hereby approved.

2. Accelerated Payment Provision

Ameren proposed modifying Section 9.2 of the SFC to provide for weekly, rather than bi-monthly payments to suppliers in the event CILCO's, CIPS', or IP's credit rating drops below a minimum rating, which is expected to reduce the suppliers' credit risk related to utility default and thus result in a lower overall expected cost. ComEd supports this proposal.

The Commission believes that this proposal will improve the auction; no party opposed it and it is hereby approved.

3. Division of Unsecured Credit

Ameren proposed that affiliates who qualify for credit on their own should not each be eligible for the full amount of credit as indicated in the Table in Section 6 of the SFCs. Rather, unsecured credit for affiliates should be divided appropriately among such affiliates. Ameren's experience is that this approach is consistent with credit risk management practices in use throughout the energy industry. Ameren says this approach limits credit exposure concentration that could otherwise set in if multiple affiliates under a single ultimate parent were allowed to qualify individually for material amounts of unsecured credit.

ComEd supports this proposal, and no other party opposed it.

The Commission believes Ameren's proposal is reasonable and it is hereby approved.

4. Proposed changes to the Application Process

Both Ameren and ComEd support the proposal of the Auction Manager, Dr. LaCasse, to modify the auction application forms to clarify aspects that appeared confusing to bidders. These include Section A.7 of the Part 1 Application, where prospective suppliers signify their ability to comply with the PJM requirements of the CPP Supplier Forward Contracts; Section A.6 of the Part 1 Application, where prospective suppliers provide financial information or indicate that such information is unavailable; and Section B.2 of the Part 2 Application, where qualified bidders specify the pre-auction security that is provided with their application. The modified Part 1 Application Form and the Part 2 Application Form are provided as Auction Manager Exhibit 1.4 and Auction Manager Exhibit 1.5 respectively.

The Commission understands that the proposal of the Auction Manager is intended to assist bidders and was not opposed by any party; it is hereby approved.

Both Ameren and ComEd support the proposal of Dr. LaCasse to provide prospective suppliers an additional document regarding the Registered Agent requirement well in advance of the application process. As Dr. LaCasse explained, this additional information will allow prospective suppliers and their guarantors to begin the process of obtaining agents sooner and will assist them in meeting this obligation.

The additional document is included in the record as Auction Manager Exhibit 1.6. ComEd also supports the related recommendation of Dr. LaCasse that the Auction Manager develop a list of entities willing to act as Registered Agents to Illinois Auction applicants and guarantors, and that this list be made available to prospective suppliers upon request.

The Commission understands that the Auction Manager has made two recommendations intended to assist bidders who wish to use a Registered Agent in the Auction process. It appears that these proposals could improve the auction process, were not opposed by any party; the Commission, therefore, approves these changes.

ComEd and Ameren support the proposal of Dr. LaCasse to revise the Pre-auction Letter of Credit to eliminate the word "therefor." Dr. LaCasse explained that the current form is not incorrect, but many financial institutions assumed that it contained a typographical error and replaced "therefor" with "therefore." In so doing, they changed the meaning of the text in an unacceptable manner, and prospective suppliers were required to work with their financial institution to provide an amendment to the letter of credit. The letter of credit form, as reworded and changed to conform to the 2008 Auction, is included in the record in Auction Manager Exhibit 1.7.

In the Commission's view, this change will reduce the risk that a prospective supplier will submit a deficient application and be unable to remedy the deficiencies by the time required, thus jeopardizing participation in the auction. The Commission hereby approves this unopposed recommendation to modify the Pre-auction Letter of Credit.

VI. OTHER PROPOSED CHANGES

A. Combination of MVA and SCA Factors on Customer Bills

Ameren proposes that the Market Value Adjustment ("MVA") and Supply Cost Adjustment ("SCA") factors be combined with the base Retail Supply Charge on the customer's bill in an effort to minimize confusion and misunderstanding. Ameren says that presently, Ameren separately states the Retail Supply Charge, MVA, and SCA charges. Ameren says the MVA represents Ameren's monthly over-under adjustment where costs and revenue are balanced. According to Ameren, the SCA represents a combination of the Uncollectible, Cash Working Capital Adjustment, and the Supply Procurement Adjustment factors. Ameren says all of these SCA components must be set or determined in a delivery services rate case, and for the fixed price auction products, the total SCA amount only changes when new auction results are incorporated. (Ameren Initial Brief at 64)

Ameren says it has received anecdotal feedback indicating that customers, especially residential and small commercial customers, are confused by three line items for cost of power on their bill. For that reason, Ameren recommends combining the MVA and SCA components into a single component on a customer's bill to help minimize confusion and misunderstanding. Ameren says that under this proposal, customers would see a MVA line item, plus the appropriate Retail Supply Charge. Ameren says this would be done for both the BGS-FP and BGS-LFP categories of service. (Ameren Initial Brief at 64)

The Commission has reviewed the record regarding Ameren's proposal to combine the MVA and CSA components into a single component for BGS-FP and BGS-LFP customers. It appears this proposal is now uncontested. The Commission believes that this proposal would be helpful in improving customer understanding of their bills, and it is therefore approved.

B. Confidentiality of Bidder Information

1. Definition of Confidential Information

a. ComEd's Position

ComEd supports the recommendation of Dr. LaCasse to define confidential information more specifically and to protect against the adverse consequences that could result if it were disclosed. In ComEd's view, protecting confidential bidder information encourages participation in the process. Preserving the confidentiality of certain auction methodologies, ComEd argues, is important in getting the best price for customers. (ComEd Initial Brief at 73)

ComEd claims the auction process should strike the right balance between making information public when appropriate, and keeping it confidential when it serves the public interest and the goals of the auction to do so. Based on the experience gained from the 2006 Illinois Auction, Dr. LaCasse made a proposal that will achieve these objectives. ComEd states that under the proposal, Rider MV and Rider CPP would be modified (1) to specify the information items that would be released in the Public Report of the Auction Manager and that could be released in the Public Report of the Staff, and (2) to state that any information other than the information released in the Public Report of the Auction Manager would remain confidential, unless publicly released by the Commission.

ComEd indicates that the first part of the Public Report of the Auction Manager, which contains the bulk of the information generated by the auction process and the Auction Manager's recommendations, would become available no earlier than 15 business days after the close of the auction. This would provide to all parties the information needed for the auction improvement docket to start promptly, thus allowing sufficient time to prepare for the next auction. The second part, containing information that should be kept confidential for a longer period of time after the auction, such as the supplier-product match, would be released 60 business days after the close of the auction. (ComEd Initial Brief at 73-74)

ComEd asserts that these recommendations serve to resolve the tension between the timeline established in Rider CPP and Rider MV and the time practically required for conducting improvement dockets and implementing changes in the next auction. ComEd claims they also serve to clarify information to be made available to all stakeholders through the Public Report of the Auction Manager, thus providing continuous and open communication with all interested stakeholders. On the other hand, ComEd asserts that they maintain the confidentiality of bidder and auction information that, if released, could negatively affect participation in the auction, and thus the ability of the auction process to deliver reliable supply at competitive market prices. (ComEd Initial Brief at 74)

In its Reply Brief, ComEd says that although Midwest Gen/EMMT and Dynegy oppose the third exception to Staff's proposed definition of confidential bidding data, the Auction Manager and Staff must have the ability to provide information that they deem necessary to convey in their public reports and that an effort to define all such categories of information in advance is simply not practical. (ComEd Reply Brief at 31)

b. Staff's Position

Staff initially proposed to define confidential bidding data as "all bidding information except for (1) the names of the winning bidders; (2) the precise number of registered bidders, the ranges of excess supply for each section and the going prices for each product reported to bidders during the auction, and the number of tranches of each product won by each of the winning bidders; and (3) any other information that the Auction Manager and the Staff deem necessary to convey in their public reports on the auction as described in the CPP Documents section and the CPA Documents section of ComEd's Rider CPP and the Ameren Illinois Utilities' Rider MV, respectively."

Staff revised its proposed exceptions to read as follows:

> (2) the precise number of registered bidders, the ranges of excess supply for each section and the going prices for each product reported to bidders during the auction, which shall be reported by the Auction Manager and by the Staff to the public within the first part of their Public Reports 15 business days after the close of the auction; (3) the number of tranches of each product won by each of the winning bidders, which shall be reported by the Auction Manager and by the Staff to the public within the second part of their Public Reports 60 business days after the close of the auction; and (4) any other information that the Auction Manager and the Staff, to fulfill their respective responsibilities, deem necessary to convey in their public reports on the auction, as described in [the CPP Documents section of the Competitive Procurement Process part of this Rider [for ComEd] or the CPA Documents section of the Competitive Procurement Auction Process part of this Rider [for the Ameren Illinois Utilities].

(Staff Initial Brief at 65-66)

In its Reply Brief, Staff maintains that its definition is not overly broad and does not put too much discretion in Staff's and the Auction Manager's hands. As set forth in the definition, Staff and the Auction Manager can only disclose that information which is necessary to carry out their duties in preparing the public reports on the auctions. Staff argues that if disclosure of the information is not necessary to carry out those duties with regard to the public report, then under the definition set forth above Staff and the auction manager cannot disclose that bidding data. (Staff Reply Brief at 41)

Staff says Dynegy and Midwest Gen/EMMT argue that Staff and the Auction Manager have not testified as to the necessity for the exception. According to Staff, this argument should be rejected as well. Staff claims the necessity for the provision is clearly set forth in the exception's language. According to Staff, that language makes it clear that Staff and the Auction Manager are under a duty to prepare public reports and as part of carrying out that duty, it is conceivable certain information contained in the bidding data may need to become public. (Staff Reply Brief at 41-42)

Staff says Dynegy argues that the provision may undermine the confidence of potential suppliers and Midwest Gen/EMMT argues that the provision may discourage suppliers' participation in the auction. Staff points out that neither Midwest Gen/EMMT nor Dynegy state that they will decline to participate in the auction because of the provision, and that Midwest Gen/EMMT states that it does not believe Staff and the Auction Manger would purposefully seek to undermine the auctions by releasing confidential information publicly. In Staff's view, Dynegy and Midwest Gen/EMMT's fears are nothing but unsupported speculation. (Staff Reply Brief at 42)

c. Dynegy's Position

Dynegy says it does not oppose the concept of including language in the tariffs regarding the topic of confidentiality. Dynegy adds that one phrase included in Staff's proposal, however, raises a concern. In the definition of "confidential bidding data" proposed by Staff, the third exception reads: "(3) any other information that the Auction Manager and the Staff, to fulfill their respective responsibilities, deem necessary to convey in their public reports on the auction …" Dynegy says Staff did not provide any basis for the need for such a broad grant of discretion to both it and the Auction Manager. Absent some indication that such broad discretion is necessary (for example, due to events surrounding the first Auction), Dynegy claims this prong of the definition should be rejected because it risks "undermining the confidence potential suppliers will have in the protection afforded their confidential information." (Dynegy Initial Brief at 16-17)

In its Reply Brief, Dynegy says the only reference Staff makes to this prong of its definition is to note the opposition to it. (Dynegy Reply Brief at 14, citing Staff Initial Brief at 66) According to Dynegy, it cannot be an oversight when Staff fails to justify its proposed definition. Dynegy argues that given the total lack of any support for the third prong, it should be rejected.

d. EMMT/Midwest Gen's Position

On the issue of whether the Commission should include a broad exception to the otherwise appropriate and reasonable definition of confidential information, without a showing that such an exception is necessary, Midwest Gen believes that such an exception is unwarranted. (EMMT/Midwest Gen Initial Brief at 15) Midwest Gen says appropriate definition of confidential information is essential to protecting sensitive bidder and auction data. Midwest Gen supports the proposal to define clearly the bidding and auction information to be preserved as confidential. However, Midwest Gen believes the third exception to the definition above undermines the purpose of crafting an unambiguous definition. Midwest Gen asserts that neither the Staff nor the Auction Manager has testified as to the necessity of this "overly broad" exception. Midwest Gen claims such an exception weakens the auction participants' confidence that their sensitive business data will not be publicly released. (EMMT/Midwest Gen Initial Brief at 16)

Given the Auction Manager's acknowledgment that making sensitive business information public can discourage participation by prospective suppliers and thus reduce competition at the auction, Midwest Gen recommends that the Commission adopt Staff's proposed definition of confidential information, but reject the third exception as overly broad. (EMMT/Midwest Gen Initial Brief at 16)

In its Reply Brief, Midwest Gen states that the definition of "confidential bidding data" as currently proposed by Staff includes a provision that would allow unlimited discretion on the part of Staff and the Auction Manager to release confidential information. Midwest Gen believes that the fourth segment of the definition currently proposed by Staff should be modified to eliminate the unlimited discretion provided to the Auction Manager and Staff to release confidential information to the public. Midwest Gen is concerned that the proposed definition is too vague to provide the necessary assurance to auction participants that information they deem competitively sensitive will not be released to the public by the Auction Manager or Staff. (EMMT/Midwest Gen Reply Brief at 7-8)

Midwest Gen states that the disclosure of an auction participant's bidding status could only harm the supplier's bargaining position in the market when making supply arrangements to bid in the auction. Midwest Gen adds that if shortly after the auction, the quantity and type of tranches that a supplier had won were to be made public, the supplier would be put in a worse negotiating position to make any needed supply arrangements as any counterparty would know the obligations faced by the supplier. (EMMT/Midwest Gen Reply Brief at 8)

According to Midwest Gen, the definition of "confidential bidding data" proposed by Staff risks undermining the confidence potential suppliers will have in the protection afforded their confidential information. Midwest Gen says the fourth section of this definition is essentially an unlimited "catch-all" that would provide Staff and the Auction Manger with unfettered discretion to make auction information public.

In its Reply Brief, Midwest Gen offers a definition of confidential bidding data that it claims would resolve its concerns. (Midwest Gen Reply Brief at 9)

> All bidding data except for: (1) the names of the winning bidders, which shall be revealed to the public when the Auction Manager issues a Declaration of Successful Auction Result; (2) the precise number of registered bidders, the ranges of excess supply for each section and the going prices for each product reported to bidders during the auction, which shall be reported by the Auction Manager and by the Staff to the public within the first part of their Public Reports 15 business days after the close of the auction; (3) the number of tranches of each product won by each of the winning bidders, which shall be reported by the Auction Manger and by the Staff to the public within the second part of their Public Reports 60 business days after the close of the auction; and (4) any other information that the Auction Manger and the Staff are required to convey in their public reports on the auction, as described in [the CPP Documents section of the Competitive Procurement Process part of this Rider [for ComEd] or the CPA Documents section of the Competitive Procurement Auction Process part of this Rider [for the Ameren Illinois Utilities].

e. Commission Analysis and Conclusions

The Auction Manager, Dr. LaCasse, recommended that confidential information be defined more specifically. It was suggested by some parties that a more detailed definition would help strike the right balance between making information public when appropriate, and protecting the confidentiality of certain bidder information in an effort to encourage bidder participation in the process. To this end, as described above, Staff proposed a broad definition of confidential bidding data, with several exceptions.

It appears the only contested aspect of Staff's definition of confidential data is the final exception proposed by Staff. That exception applies to "any other information that the Auction Manager and the Staff deem necessary to convey in their public reports on the auction as described in the CPP Documents section and the CPA Documents section of ComEd's Rider CPP and the Ameren Illinois Utilities' Rider MV, respectively."

Dynegy and Midwest Gen/EMMT assert the final exception is overly broad and could hamper participation in the auction by potential bidders. While the Commission's review of the final exception indicates that it is, in fact, somewhat broad, the Commission also observes that neither Dynegy nor Midwest Gen/EMMT identified specific types of data with which they were concerned, at least prior to the filing of the Midwest Gen/EMMT's reply brief. In its reply brief, Midwest Gen/EMMT proposed to define confidential bidding data in the manner shown above.

A review of the Midwest Gen/EMMT language proposal indicates that it may have some merit, and may satisfy the concerns of Staff and other parties who weighed in on the issue; however, no party other than Midwest Gen/EMMT has had an opportunity to comment on that language since it was not proposed until the proponents' reply brief. Thus, adoption of the Midwest Gen/EMMT proposal at this juncture is problematic.

Accordingly, the Staff recommendation is found to be the most reasonable alternative of those to which other parties have had the opportunity to respond. In implementing the Staff proposal, Staff and the Auction Manager shall give consideration to the terms of the proposal advanced in the Midwest Gen/EMMT reply brief.

Notwithstanding the above, it is further observed that if the briefs and reply briefs on exception disclose no objections to approval of the Midwest Gen/EMMT language, then the possible acceptance of that language may be revisited in the order.

2. Procedures relating to Release of Bidder Information

According to Ameren, after completing one cycle of the auction process, the various kinds of information generated by the auction process are now better understood and the kinds of information that should be kept confidential, as well as the kinds of information that could eventually be released, can be more precisely identified and documented. Ameren also states that the timing of the release of bidder and auction information should be revised to take into account the Commission's decision to conduct formal reviews after each of the first three auctions and to take into account the possibility of formal reviews of future auctions.

Ameren recommends that the following changes be implemented:

- Modify Rider MV and Rider CPP so that these Riders specify the information items that would be released in the Public Report of the Auction Manager and that could be released in the Public Report of the Staff;

- Modify Rider MV and Rider CPP to state that any information other than the information released in the Public Report of the Auction Manager would remain confidential, unless publicly released by the Commission; and

- Prepare the Public Report of the Auction Manager in two parts that are released at different times. The first part, containing the bulk of the information generated by the auction process and the Auction Manager's recommendations, would become available no earlier than 15 business days of the close of the auction. The second part, containing information that should be kept confidential for a longer period of time after the auction, such as the supplier-product match, would be released 60 business days after the close of the auction.

EMMT/ Midwest Gen expresses support for the three proposed changes. They says that to ensure that participation in the auction is not discouraged, auction rules should prescribe with specificity confidential treatment of bidder and other auction information. They also state that in light of the sensitivity of that data, reasonable steps should be taken to ensure continued confidence of participants in the auction process. MWGen supports the proposals that the Commission should specify, in the auction rules, the items that may be released in Public Reports.

The Commission has reviewed Ameren's recommendations and the comments of other parties. Subject to the definition of confidential information approved above, the Commission finds that Ameren's recommendations should help improve the auction process and are otherwise reasonable. Accordingly, the Commission hereby approves Ameren's recommendations.

C. Risk Associated with changes in MISO Rules

1. Dynegy's Position

According to Dynegy, currently, the impact of and risk due to most changes in RTO rules (PJM or MISO) fall on suppliers and not on ComEd or Ameren, respectively. Dynegy says the two RTOs are not, however, at the same point in their evolution. The MISO markets and rules, Dynegy asserts, are not as mature as those in PJM. Dynegy claims this lack of maturity increases the risk faced by suppliers. Not surprisingly, Dynegy contends, the addition of this risk means that a risk premium will be included in the auction clearing price.

Dynegy argues that unlike some other risks, in this case, both suppliers and Ameren have an ability to influence and shape MISO developments. Given the role played by both parties, Dynegy says Ameren too can help keep the impact on the Illinois Auction products of any potential changes in MISO to a minimum, yet it currently has little incentive to do so. To align the incentives and lower the embedded risk premium, Dynegy proposes a change to the applicable SFC provisions in DYN Ex. 1.1 at 22-31 and 34-41. (Dynegy Initial Brief at 13-14)

Ameren, Dynegy says, does not disagree that they, like every other MISO participant, have an ability to influence changes within MISO. Instead, Dynegy complains that Ameren picks nits with the actual language Dynegy proposes. Dynegy acknowledges there may well be other ways to change the SFCs to accomplish the goal. Rather than just grouse about Dynegy's language, Dynegy asserts that Ameren should have offered different language to better align their incentives with their actions. Absent that, Dynegy claims its language is the only proposal to align incentives and risks and reduce the risk premium borne by ratepayers.

In its Reply Brief, Dynegy says Ameren admits it has one vote in MISO (as does Dynegy), yet they argue against an incentive to use that vote in a manner that reduces retail customers' costs. Dynegy asserts that under this logic, Dynegy too should not be required to bear the burdens of MISO changes since it too has but one vote. Dynegy says it proposed that such burdens be shared among suppliers and Ameren, so that everyone's incentives are properly aligned. (Dynegy Reply Brief at 11)

2. Ameren's Position

Ameren asserts that a detailed reading of DYN Ex. 1.1 reveals that the actual language Dynegy proposes to include in the SFC does not represent a simple sharing of such consequences, but rather, Dynegy only proposes to share the consequences of such a rule change when it is negative to the supplier – thus continuing to have 100% of any positive consequence accrue to the benefit of the supplier. Intentional or otherwise, Ameren claims this is not an appropriate allocation. (Ameren Initial Brief at 56)

According to Ameren, the long list of changes referenced in the language goes far beyond MISO rule changes to include such nebulous terms as MISO "pricing," "market conditions" and "market rules." Ameren argues that the limits, if any, of what Dynegy is suggesting is unclear. Ameren claims this language indicates that any changes in market conditions – e.g., something as simple as the supply and demand balance, the price of crude oil, changes in weather patterns or a change in forward pricing – will now result in a sharing of any negative consequences (as the positive consequences are fully retained by the supplier). Ameren contends that such broad, ambiguous language is inappropriate. (Ameren Initial Brief at 56)

Ameren also complains that it is unclear how the "adverse financial consequences" Dynegy refers to could reasonably be determined. Ameren says that while it may appear easy to determine the consequence of a price change -- for example, with specified prices and volumes -- attempting to quantify the cost of a change such as what time MISO closes the day-ahead demand bidding, for example, is nearly impossible, and even then purely theoretical. For that reason, Ameren asserts that adopting Dynegy's proposal will result in near-constant litigation over the minutia of each change that any given supplier may divine.

In Ameren's view, the SFCs should not be modified to incorporate such sharing language, particularly language that is so broad in scope as to be nonsensical and would force Ameren to share the cost of negative consequences without being able to enjoy any of the benefit of positive consequences. Ameren believes this is especially so when one considers that the consumer bears the ultimate cost of a MISO rule change, whether borne by the supplier and incorporated in its pricing, or shared between such a supplier and the utility, with the latter including such costs within the customer's rate. (Ameren Initial Brief at 56-57)

Ameren says Dynegy's proposal also includes a provision that Ameren would bear 100% of the negative consequences of any such change that it initiated or proposed. Ameren asserts that the premise behind this proposal is in error, as no single participant is able to dictate change. Ameren says the MISO Stakeholder process involves a wide variety of market participants; including suppliers, generators, LDCs, regulators, municipalities, cooperatives, customer groups and industry consultants. According to Ameren, the voting structure within this process is such that those with common ownership have a single vote. For example, all of the Ameren utilities – both in Illinois and Missouri, Ameren Services Company, Ameren Energy Marketing, Ameren Energy Resources, etc. – collectively have one vote.

Similarly, Dynegy, and all of the associated entities within Dynegy, have one vote. The smallest co-op member of MISO has one vote. According to Ameren, change in the stakeholder process is effected through majority support of the 96 stakeholders who hold a vote and having only one vote for the entire corporate family does not allow the Ameren Illinois utilities to dictate change. Given the voting structure within MISO, it is unclear how Dynegy would determine whether one of the Ameren Illinois utilities had initiated or proposed a change. Ameren asserts that even more dispute and litigation over this issue may occur, as suppliers may attempt to cast any proposal by any Ameren entity, even one which was itself a BGS Supplier, as initiated by one of the three Ameren Illinois utilities. In Ameren's view, Dynegy's proposed language would seemingly inject uncertainty into the provision and attempt to discourage the utilities from proposing changes at MISO that could be beneficial to the overall market. (Ameren Initial Brief at 57)

3. Staff's Position

Staff believes Dynegy's proposal would likely generate future controversy over what constitutes a "market rule change" and even more controversy over computing the level of financial consequences brought about by those changes. Staff says it would likely be an indirect cause of such disputes, since Ameren might anticipate that, to protect ratepayers, Staff would use annual prudence reviews to dissect each instance where market rule changes led to utility payments to suppliers (assuming that Ameren would seek reimbursement of such costs through one or more of its retail rate riders). Thus, in Staff's view, this proposal should be rejected. (Staff Initial Brief at 58)

Staff states that according to Dynegy, Ameren is merely "picking nits" and "grousing" about Dynegy's proposed language, and if Ameren does not offer different language, the Commission should accept the Dynegy proposal. Staff claims both it and Ameren point out that Dynegy uses ambiguous and "nebulous" terms, which one might be able to improve upon if one knew what Dynegy really meant to say. Staff claims it is up to Dynegy, not Ameren, to make Dynegy's proposals clear. (Staff Reply Brief at 37)

Staff asserts that in addition to the problem of ambiguity in Dynegy's language, there are problems with its fundamental concepts. For instance, Staff states that it and Ameren concur that the proposal would require difficult to impossible determinations of "adverse financial consequences" of MISO rule changes. (Staff Reply Brief at 37)

Equally troubling to Staff is where Dynegy is clear, like where it calls for the Ameren to bear 100% of the negative consequences of any such MISO change that it initiated or proposed. Staff agrees with Ameren that the very premise behind this proposal is in error, as no single participant is able to dictate change. Staff also agrees that the proposal would discourage the utilities from proposing changes at MISO that could be beneficial to the overall market. (Staff Reply Brief at 37-38)

4. Commission Analysis and Conclusions

As the Commission understands it, Dynegy wants the Commission to enact provisions whereby Ameren would be responsible for certain costs that MISO imposes on suppliers as a result of rule changes. Dynegy's rationale is stated above. This proposal is opposed by Ameren and Staff. The Commission observes that Dynegy made a somewhat similar proposal in the Ameren procurement docket, and that proposal was not adopted in the Ameren Procurement Order.

The Commission first observes that to the extent Dynegy is particularly concerned about changes that Ameren proposes or supports, the record is clear that Ameren cannot impose the costs at issue here on suppliers; such costs can only be imposed by MISO. In this regard, both Ameren and Dynegy have one vote in deciding whether MISO rules would be changed to impose costs on suppliers.

Furthermore, as explained in the Procurement Order, the Commission is not inclined to approve a mechanism in the Auction process where increased costs ultimately incurred by suppliers are passed directly through to ratepayers. Generally speaking, the Commission prefers the alternative, whereby suppliers assess the possible impact of MISO rule changes on them and include in their auction bids the value they place on that risk, just as they do with other risks. This concern is particularly relevant under the Dynegy proposal, where the nature and scope of changes that would trigger a sharing under the language advanced by Dynegy is somewhat broad and ambiguous.

In conclusion, the Commission finds that Dynegy's proposal should not be adopted at this time.

D. Risk Associated with Delivery System Infrastructure Problems

1. Dynegy's Position

This issue, Dynegy states, offers a stark contrast between the party who bears the risk and the party with the ability to manage (and presumably lower) the risk. Dynegy says that in general, suppliers currently bear substantially all of the risk associated with changes in load from, for example, customer switching and weather variations. Dynegy adds that, in general, neither the supplier nor the utilities has control over these risks and it seems unlikely that the cost associated with mitigating them would be less if imposed on the utilities as opposed to the supplier. Thus, Dynegy asserts, in either case, the retail customer's charge would likely be unchanged regardless of how these risks are shifted between the utilities and the supplier. (Dynegy Initial Brief at 14; Reply Brief at 12)

Dynegy claims that suppliers also face another supply risk: that of being unable to serve load that would have been served but for a utility's infrastructure problems due to its own lack of prudence in maintaining its system. According to Dynegy, as between the supplier and the utility, there can be little doubt that the party with control over the risk is the utility. On the one hand, Dynegy says utilities (if they bore the financial consequences) could minimize this risk by doing what they should in theory already be doing by properly maintaining their systems. On the other hand, Dynegy says suppliers' only option is to include a risk premium without the ability to take actions to otherwise minimize the risk. As between the two alternatives, Dynegy believes retail customers would be better off if the utility took on this risk. (Dynegy Initial Brief at 14-15)

Dynegy argues that since the first Auction, this risk has proven to be more than a hypothetical construct. Dynegy says the recent infrastructure problems noted on the Ameren systems have become so worrisome as to warrant an ongoing investigation. (Dynegy Initial Brief at 15)

To properly allocate the risks, Dynegy proposed changes to the SFCs and Dynegy says, once again, the utilities grouse about the perceived problems with the language but failed to provide alternative language that addressed the concerns raised by Dynegy. According to Dynegy, if the utilities are concerned about, for example, needing more precise language to minimize future disputes, then they should propose draft language to accomplish that goal rather than just argue they should not be held responsible for their inactions. Given the current state of the record, Dynegy believes its language is the only proposal to align incentives and risks and reduce the risk premium borne by ratepayers. (Dynegy Initial Brief at 15)

In its Reply Brief, Dynegy says its proposal does not turn the SFCs into "take or pay" contracts. Dynegy asserts that its proposal would represent a narrow exception to the general rule that, in general, suppliers bear the risk that load will not actually materialize. Dynegy says that narrow exception covers a narrow situation in which the utilities (and not suppliers) have more control over the risk (widespread outages due to a lack of prudence by utilities), an example of which may well have occurred since the first Auction.

Dynegy argues that this narrow exception in no way makes the SFCs "take or pay" contracts. Dynegy says if customers switch, it is still suppliers (and not utilities) that bear the risk of load not materializing. Dynegy adds that if the weather is milder than anticipated, it is still suppliers (and not utilities) that bear the risk of load not materializing. Dynegy claims that the party with the most ability to mitigate the risk Dynegy identifies is the utilities. To lower the embedded Auction price premiums, Dynegy argues that utilities (and not suppliers) should bear that risk. Dynegy says if utilities and others have alternative language to reach the same endpoint, Dynegy would welcome it. (Dynegy Reply Brief at 12-13)

2. Ameren's Position

Ameren argues that Dynegy's proposal would change the nature of the SFCs from a full requirements product for the amount of energy actually consumed to "take or pay." Ameren claims that under Dynegy's proposal, every outage on the system could be subject to a potential prudence review and likely result in frequent dispute and possibly litigation between the parties. Ameren asserts it would also result in a transition from a regulatory process where prudence review is initiated by customer complaints to review initiated by suppliers. Even if imprudence were determined for a given outage, Ameren says the payment of damages requires the calculation of the "as if" load and a proof by suppliers of what their actual, even specific damages were – neither of which is an exact science, and would likely lead to further litigation.

According to Ameren, the purpose of including damage provisions into a contract is to incent proper behavior, and to provide a remedy when this does not occur. Ameren claims it already has such an incentive without including such an unmanageable provision in the SFCs. (Ameren Initial Brief at 58)

While Dynegy claims that a cost reduction would result from implementing this recommendation, Ameren asserts that during periods of outage, a supplier will either be able to sell what would be the excess supply (if the supplier were long), or avoid the purchase of supply (if the supplier were short). Ameren claims the amount of damages is substantially less than the simple loss of revenue. Ameren says the goal is to achieve the lowest overall cost to consumers – not the lowest possible auction price. According to Ameren, even if including this provision in the SFC may result in a slightly lower price for the auction products that does not necessarily translate into a lower overall cost to consumers, as one must now figure in the potential cost of litigation every time an outage occurs. (Ameren Initial Brief at 58-59)

3. ComEd's Position

ComEd argues that the central problem with Dynegy's proposal is that Dynegy is proposing a different "product" than the one ComEd is willing to buy. What ComEd is purchasing is a full requirements electric supply product in which it pays only for the electricity actually used (i.e., electricity consumed) by its customers that take supply service from ComEd.

Dynegy, ComEd claims, proposes a different product with a "take or pay" characteristic requiring ComEd to pay for certain electricity that is not delivered to, or used by its customers. ComEd asserts that redefining the product in this way will inevitably lead to disputes concerning outages between ComEd and suppliers, which has the potential to dramatically increase ComEd's costs – and ultimately the costs borne by consumers – as well as to delay payments and give rise to questions of when and in what amount payments are owed to suppliers. ComEd says Dynegy never addresses obvious practical problems with its proposal, such as how ComEd would recreate its customers' "but for" electricity consumption in order to pay suppliers for electricity not delivered. (ComEd Initial Brief at 63-64)

ComEd also maintains that Dynegy's proposal would inevitably give rise to after-the-fact prudence reviews of distribution outages in the context of supplier, not customer, complaints. ComEd says the reliability requirements now imposed upon Illinois electric utilities by statute and regulations give effect to ComEd's obligations to its customers. ComEd also asserts that they provide more than enough incentive for ComEd to keep outages due to imprudence to a minimum. ComEd fears that Dynegy's proposal could create overlapping, and potentially inconsistent, reliability obligations. (ComEd Initial Brief at 64)

ComEd emphasizes that suppliers are bidding on a full requirements product and that small load variations, of the type distribution outages might create, will be commonplace hourly events which the suppliers must be prepared to handle. ComEd claims this is the nature of the service that they are offering to provide. ComEd further asserts that distribution outages do not change that risk, since there is minimal system impact resulting from any single distribution outage. ComEd also says it will provide historical load data to suppliers on the Illinois Auction website. To the extent outages have occurred, ComEd states that they are reflected in that historical usage data and, thus, the risk will be factored into suppliers' bids. According to ComEd, barring any "bizarre and catastrophic event," of which the suppliers (and everyone else) would become promptly aware, providing this data will address the issue. (ComEd Initial Brief at 64; Reply Brief at 29)

4. Staff's Position

Citing the problems cited by Ameren in testimony, Staff objects to the Dynegy proposal, asserting it is undesirable, unworkable and unnecessary. Staff recommends that the Commission reject the proposal to impose penalties on utilities if suppliers are unable to supply due to infrastructure problems on the utilities' systems. (Staff Initial Brief at 60)

In its Reply Brief, Staff adds that under Section 8-102 of the Act the Commission has the authority to investigate a utility if it has concerns with a utility's infrastructure. Staff argues that given this authority and tool the SFC penalty provisions which Dynegy proposes are not necessary to deal with infrastructure issues. (Staff Reply Brief at 38)

5. Commission Analysis and Conclusions

Dynegy believes that suppliers face risk due to the possibility of distribution system outages resulting from utility imprudence. Dynegy has proposed specific language for the SFC intended to transfer the risk of imprudent actions from suppliers to the utilities. Among other things, ComEd, Ameren and Staff argue that Dynegy's proposal would lead to extensive litigation and increase costs for ratepayers. They also claim that Dynegy's proposal results in something more like a "take or pay" contract than a full requirements contract.

The Commission is not unsympathetic to Dynegy's concerns and its disagreement with the utilities' position on this issue. The Commission understands that Ameren and ComEd would like to avoid prudency reviews, especially those initiated by suppliers. However, the electric markets in Illinois are not what they were before the Electric Service Customer Choice and Rate Relief Law of 1997 was enacted. Furthermore, Ameren and ComEd have chosen to divest their electric generation assets. The idea that Ameren and ComEd should not have to face conflict or litigation with generation suppliers, or that they will automatically be allowed to pass along the costs thereof to their customers, is not one the Commission necessarily endorses. The Commission suggests that ComEd and Ameren accept the fact that not all of the statutory changes necessarily favor them. If a utility engages in imprudent activities that cause suppliers to incur costs or lose profits, the Commission does not intend to protect the utility from its suppliers' claims.

Nevertheless, the Commission cannot adopt Dynegy's proposal in this proceeding. While the Commission understands Dynegy's concerns, its specific proposal is too problematic to be adopted as a workable and functional part of the auction process. The Commission believes that if adopted, the proposal could easily lead to extensive litigation, with every outage on the system potentially being subject to a prudence review, both over whether utility imprudence occurred and how damages would be assessed.

Based on its review of the record, the Commission believes that in the context of the 2008 Auction, the costs associated with Dynegy's proposal would likely exceed the potential benefits and therefore is not in the public interest. Accordingly, Dynegy's proposal will not be adopted in this proceeding. Whether Dynegy's concerns may properly be addressed in a different forum is a question the Commission does not reach in this Order, and no presumptions are created with respect thereto. With respect to the reliability of the utility's distribution systems, other processes and proceedings are available to address such issues.

E. Acquisition of Ancillary Services

According to Dynegy, this issue arises because of the timing of procurement of ancillary services by Ameren, especially prior to the development of a market in MISO for those services. To address the issue, Dynegy proposed a process change that would require Ameren to procure ancillary services in a timely fashion. Dynegy says that in rebuttal testimony, Ameren laid out a process that appears to resolve the issue. Dynegy says the only remaining opposition may be from Staff, seemingly based on a misunderstanding of Dynegy's proposal. Dynegy says it did not propose that the modification to resolve this issue be included in language in the SFCs but rather that it be a process change in the timing of when Ameren procures ancillary services. Dynegy says it agrees with Staff that the SFCs are not the proper place to address this issue. Dynegy maintains that the Commission can and should address this issue in its final Order. (Dynegy Initial Brief at 16)

Ameren says its current contracts for Ancillary Services will expire on December 31, 2007; therefore, it will be necessary for the Ameren to procure the required Ancillary Services prior to January 1, 2008. With the next Illinois Auction scheduled for mid-

January 2008, Ameren says the procurement will be complete and Ameren's estimate of the resulting Ancillary Services rates will be posted to the MISO OASIS site prior to the auction. According to Ameren, the posting of estimated rates rather than actual rates is necessary due to the nature of the pricing terms included in the ancillary services purchase contracts. Ameren says the existing ancillary services contracts include a variable pricing structure and it is anticipated that the contracts that result from future procurements of ancillary services will include variable pricing as well. (Ameren Initial Brief at 60-61)

Staff suggests it would be impossible or at least unwieldy to unambiguously write Dynegy's contingencies into the SFCs. Staff says while Dynegy provided numerous changes to the SFCs reflecting some of its other recommendations, it did not do so for this particular recommendation. In its Initial Brief, Staff recommends against adopting Dynegy's proposal on the grounds that it would likely lead to unnecessary and costly disputes over its implementation. Staff generally believes that suppliers should be responsible for making the decisions for arranging whatever generation, transmission, and ancillary services are required to meet the load requirements under the SFCs. (Staff Initial Brief at 62-63)

In its Reply Brief, Staff says Dynegy clarified in its Initial Brief that it is seeking a "process improvement" rather than an SFC change, and that Ameren has adequately addressed Dynegy's concerns. (Staff Reply Brief at 39, citing Dynegy Initial Brief at 16) Given this clarification, Staff withdraws its previous objection.

It appears to the Commission that this issue is no longer contested. The proposed process improvement agreed to by Dynegy and Ameren is deemed reasonable and is hereby approved.

F. Common Deliverability Test

1. IIEC's Position

In the power procurement dockets, IIEC says it advocated a common deliverability test to facilitate supply switching between ComEd and Ameren products in the auction. IIEC indicates the Commission directed the utilities to work with MISO and PJM to implement such a test. (IIEC Initial Brief at 17)

In its direct testimony in this proceeding, IIEC requested that the utilities advise the record on the progress that has been made in regard to the development of such a test. IIEC continues to believe this is an important issue. IIEC asserts that the lack of such a test may have affected bidding behavior in the September 2006 Auction. IIEC claims that final auction round results disclose that major suppliers focused exclusively, or nearly exclusively, on either the Ameren service territory or the ComEd service territory. IIEC says only one winning bidder, Constellation Energy Commodities Group, Inc., had a significant number of tranches in each utility auction. ComEd offered rebuttal testimony explaining its actions to encourage the PJM and MISO RTOs and

RTO stakeholders to consider and implement such a test. ComEd witness Naumann stated that ComEd has participated in technical conferences, workshops and other PJM and MISO proceedings relating to the overall development of the joint and common market for PJM and MISO. Further, IIEC says ComEd apparently proposed that a joint deliverability test for Illinois be included in the joint transmission planning process for PJM and MISO. (IIEC Initial Brief at 17-18)

According to IIEC, ComEd's proposed "joint deliverability standard" makes the perfect the enemy of the good. IIEC says the Commission instructed Ameren and ComEd to pursue a Common Deliverability Test for potential supply in the Illinois auctions, not a Joint Deliverability Standard that requires 100% of the capacity resource generation in PJM be deliverable in MISO and 100% of such generation in MISO be deliverable in PJM. IIEC says implementation of a Common Deliverability Test does not require 100% of generation in the combined footprint to be deliverable to all load in the combined footprint. IIEC asserts that if 95% of the generation in the combined footprint of the two RTOs is deliverable to all load in the combined footprint of the two RTOs, it would be a perfectly reasonable outcome that less than 5% of the generation in the combined footprint is deliverable only to load in one RTO or the other. (IIEC Initial Brief at 20)

IIEC argues that the implementation of a common deliverability test for MISO and PJM is clearly not dependent on meeting Mr. Naumann's "joint deliverability standard", which would require the transmission upgrades needed to allow 100% of the generation in the combined footprint of the two RTOs to be deliverable to all load in the combined footprint of the two RTOs. IIEC wants the Commission to remind ComEd that it has been charged to work with Ameren, MISO and PJM to implement a Common Deliverability Test for MISO and PJM, not a Joint Deliverability Standard. ComEd should be instructed to focus its efforts on the former objective at this time, not the latter. (IIEC Initial Brief at 20-21)

In its Reply Brief, IIEC maintains that there is some confusion about whether PJM and MISO should be implementing a Common Deliverability Test or a Joint Deliverability Standard. IIEC says the former is simply an administrative test, which would be common to both RTOs, used to determine whether a particular generating unit in one RTO was deliverable to load in the other RTO. IIEC claims it does not require all generation to be so deliverable. IIEC asserts that 95% of the generation identified as capacity resource generation within the common footprint of the two RTOs is deliverable to load in each RTO. IIEC argues that a Common Deliverability Test has the potential to increase generation available to serve load in the ComEd (PJM) and Ameren (MISO) service territories and to be bid, directly or indirectly, into the auctions, thereby increasing the competitiveness of the auction. (IIEC Reply Brief at 20)

IIEC states that the Joint Deliverability Standard, which IIEC says appears to be the objective that ComEd is pursuing before PJM and MISO, would require transmission upgrades needed to allow 100% of the generation in the combined footprint of the two RTOs to be deliverable to load in each RTO. ComEd suggests that if as little as 5% of the generation is not deliverable under that standard, because of existing transmission constraints, then a Joint Deliverability Standard cannot be implemented. IIEC recommends that ComEd be directed to pursue the implementation of a Common Deliverability Test, not a Joint Deliverability Standard. (IIEC Reply Brief at 20)

2. ComEd's Position

ComEd says it has actively participated in workshops, technical conferences, and other PJM/MISO proceedings relating to the continued development of the PJM-MISO Joint and Common Market. According to ComEd, PJM and MISO determined that the first step was to pursue a common deliverability study for all of PJM and MISO, to determine if units are deliverable in both RTOs and, if not, what system constraints limit that joint deliverability. ComEd says the joint deliverability study was completed in 2006 and concluded that: "The common generator deliverability analysis demonstrated numerous constraints on the MISO and PJM systems. If not resolved through system upgrades, these constraints would result in small amounts of restricted generation on both the MISO and PJM systems." (ComEd Initial Brief at 78)

ComEd says that while it does not control the process and cannot direct the activities of PJM and MISO in this area, ComEd has complied with the Commission's directive in the procurement docket. According to ComEd, while the ultimate outcome of ComEd's efforts cannot be predicted, ComEd continues to support the implementation of joint deliverability along with other features of a Joint and Common Market. (ComEd Initial Brief at 79)

In its Reply Brief ComEd says IIEC claims ComEd should focus on implementing a common deliverability test, not a joint deliverability standard. ComEd asserts that IIEC fails to explain how there can be a joint deliverability test without a joint deliverability standard that such test is to meet. ComEd says IIEC also takes issue with Mr. Naumann's testimony explaining the impact on efforts to create a fully integrated Joint and Common Market of even a relatively small percentage of constraints, given that the RTO markets require that capacity resources be deliverable throughout their footprints.

ComEd states that that universal deliverability of capacity resources is what makes markets like this function. ComEd argues that if IIEC believes that PJM and MISO should pursue a common deliverability test that both maintains the ability of existing resources to participate in the market and does not require resolution of existing constraints through system upgrades, that is a fundamental market design and system operating issue that cannot begin to be decided in this proceeding, or even by the Commission. ComEd asserts it is neither a matter that is within ComEd's control nor an issue within the scope of the Commission's direction to ComEd and Ameren to work toward promoting common deliverability. (ComEd Reply Brief at 34)

3. Staff Position and AG's Position

Staff recommends that the Commission take notice that the establishment of a PJM/MISO Joint and Common Market, including the development and implementation of a common deliverability test, are currently in a state of flux. Since no witness in this docket made any other recommendations concerning this issue, Staff advises against taking specific actions. (Staff Initial Brief at 70)

In its Reply Brief, the AG say it agrees with IIEC that a common deliverability test should be adopted even in the absence of 100% deliverability, particularly in light of evidence that 95% of the generation in the combined footprint of MISO and PJM is deliverable to all load in the combined footprint of the two RTOs. (AG Reply Brief at 5-6)

4. Commission Analysis and Conclusions

The Commission has reviewed the evidence relating to implementation of a common deliverability test, which includes testimony by IIEC witness Stephens and ComEd witness Naumann, as well as the arguments of the parties as summarized above.

IIEC recommends that ComEd "be directed to pursue the implementation of a Common Deliverability Test, not a Joint Deliverability Standard." (IIEC Reply Brief at 20)

ComEd claims IIEC fails to explain how there can be a joint deliverability test without a joint deliverability standard that such test is to meet. Mr. Naumann said, "ComEd will nonetheless continue to support, in appropriate forums, the establishment of a PJM/MISO Joint and Common Market and to support additional beneficial operational integration between PJM and MISO including, in accordance with the Commission's order, development and implementation of a common deliverability test." (ComEd Ex. 5.0 at 24-25)

Having reviewed the record, the Commission is somewhat sympathetic to the concerns raised by IIEC witness Stephens that the lack of common deliverability may have had a discernible impact on the 2006 Auction. However, the record is unclear as to whether there can be a joint deliverability test without a joint deliverability standard, or how that would work.

The Commission finds that ComEd and Ameren shall support, in appropriate forums, the establishment of a PJM/MISO Joint and Common Market and to support additional beneficial operational integration between PJM and MISO including development and implementation of a common deliverability test, to the extent such matters are within their control. The record does not support any other specific action by the Commission at this time.

VII. FINDINGS AND ORDERING PARAGRAPHS

Having given due consideration to the entire record, the Commission is of the opinion and finds that:

(1) Commonwealth Edison Company, Central Illinois Light Company, Central Illinois Public Service Company and Illinois Power Company are Illinois corporations engaged in the retail sale and delivery of electricity to the public in Illinois; each is a "public utility" as defined in Section 3-105 of the Public Utilities Act and each is an "electric utility" as defined in Section 16-102 of the Public Utilities Act;

(2) the Commission has jurisdiction over the parties and the subject matter of this proceeding;

(3) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the evidence and are hereby adopted as findings of fact and/or conclusions of law;

(4) the Auction process and design for the next Auction shall be modified in accordance with the findings and determination made in the prefatory portion of this Order;

(5) new tariff sheets reflecting and implementing the findings and determinations made herein shall be filed by ComEd and the Ameren Companies within 30 days after the date of this Order;

(6) except as modified herein, the findings and determinations made in the Commission's Orders in the Procurement Dockets shall remain in effect.

IT IS THEREFORE ORDERED that the modifications to the Auction process and design as are found appropriate above shall be implemented in the manner described above.

IT IS FURTHER ORDERED that any objections or motions not otherwise specifically ruled upon are hereby disposed of in a manner consistent with the ultimate conclusions contained herein.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By proposed order of the Administrative Law Judges this 12th day of July, 2007.

Administrative Law Judges